89-296

Supreme Court, U.S.
FILED
AUG 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

DOCKET NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

BRIAN NELSON,
Petitioner,
vs.
CATHERINE FARREY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does the Seventh Circuit's holding that the prosecution need not make a showing of unavailability prior to the admission of statements made by a child to a psychiatrist for purposes of medical diagnosis go beyond what this Court intended in *United States v. Inadi* and impermissibly erode the defendant's Sixth Amendment confrontation right in a criminal prosecution?

LIST OF PARTIES BELOW

The petitioner, Brian Nelson, and Catherine Farrey were the parties to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES BELOW	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTIONAL GROUNDS	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING WRIT	6
THE OPINION OF THE SEVENTH CIRCUIT SHOULD BE REVIEWED BECAUSE IT IMPERMISSIBLY EXTENDS THIS COURT'S HOLDING IN *UNITED STATES V. INADI* BEYOND WHAT THE COURT INTENDED AND ALLOWS THE PROSECUTION TO INTRODUCE INTO EVIDENCE CRUCIAL OUT-OF-COURT STATEMENTS MADE FOR PURPOSES OF MEDICAL DIAGNOSIS, WITHOUT A SHOWING THAT THE DECLARANT IS UNAVAILABLE TO TESTIFY	6
CONCLUSION	13

APPENDIX

Decisions Below:

Nelson v. Farrey, 874 F.2d 122 (7th Cir., 1989)

Nelson v. Farrey, 688 F.Supp. 1304 (E.D. Wis. 1988)

Order Denying Suggestion for Rehearing *En Banc*

TABLE OF AUTHORITIES

Cases	Page
Brown v. Dugger, 831 F.2d 1547 (11th Cir. 1987)	9
Coy v. Iowa, 101 L.Ed.2d 857 (1988)	6, 11, 12, 13
Delaware v. Van Arsdall, 475 U.S. 673 (1986)	7
Lee v. Illinois, 476 U.S. 530 (1986)	6, 8
Nelson v. Farrey, 874 F.2d 1222 (7th Cir. 1989)	1, 8, 10, 11, 12
Nelson v. Farrey, 688 F. Supp. 1304 (E.D. Wis. 1988)	8
Ohio v. Roberts, 448 U.S. 56 (1980)	7, 8
Pointer v. Texas, 380 U.S. 400 (1965)	6
Reardon v. Manson, 806 F.2d 39 (2nd Cir. 1986)	9
State v. Nelson, 138 Wis.2d 418, 406 N.W.2d 385 (1987)	5
United States v. Bernard S., 795 F.2d 749 (9th Cir., 1986)	8, 9
United States v. Cree, 778 F.2d 474 (8th Cir. 1985)	9
United States v. Dorian, 803 F.2d 1439 (8th Cir. 1986)	9
United States v. Inadi, 475 U.S. 387 (1986)	i, 6, 7, 8, 9, 10, 12, 13
United States v. Molt, 772 F.2d 366 (7th Cir. 1985)	8
United States v. Owens, 98 L.Ed.2d 951 (1988)	7
United States v. Renville, 779 F.2d 430 (8th Cir. 1985)	9

OTHER AUTHORITIES

Hopkins "Fathers on Trial", *New York Magazine*, January 11, 1988	11
Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C.L. Rev. 257 (1989)	8
Tuerkheimer, *Convictions Through Hearsay in Child Sexual Abuse Cases: A Logical Progression Back to Square One*, 72 Marq. L. Rev. 47 (1988)	12

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The petitioner, Brian Nelson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on May 17, 1989.

OPINION BELOW

The opinion below is *Nelson V. Farrey,* which is reported at 874 F.2d 1222 (7th Cir. 1989) and is reproduced in the appendix to this petition.

JURISDICTIONAL GROUNDS

The decision sought to be reviewed was entered on May 17, 1989. The order denying the Petitioner's Suggestion for Rehearing on *En Banc* was entered on June 21, 1989. This Court has jurisdiction to review the decision below pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The defendant asserts that he was convicted in violation

of his Sixth Amendment right to confront his accuser which guarantees in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Brian Nelson was convicted by a jury in September, 1984 of first degree sexual assault on his then three year old daughter, T.. He was sentenced to five years in the Wisconsin state prisons.

The prosecution presented no eyewitnesses to the sexual assault. T. did not testify at trial, at any pretrial proceeding, by video taped deposition or by any altered courtroom procedure. Rather, the state's case against Nelson consisted primarily of out-of-court statements made by T. to a psychologist, Dr. Donald McLean, and to a lesser extent her mother and a second psychologist, Dr. Burton Silberglitt.

T. is the daughter of the Petitioner and his ex-wife, Susan Nelson. They were divorced in April, 1982. By most accounts, the divorce was bitter; Susan Nelson characterized her relationship with her ex-husband as "stormy" with various accusations being made back and forth between them.

One month after the divorce, Susan Nelson began living with another man, Mitchell Blada. She was the custodial parent, and T. lived with them. Brian Nelson had reasonable visitation rights, although the child spent more time with Mr. Blada.

At trial, Susan Nelson testified that visitation ceased in October, 1983, because T. became apprehensive and at times hysterical when her father came to pick her up. She also testified that T. began exhibiting unusual sexual curiosities for a child her age. In December, 1983, T. attempted to pull her mother's pants down while playing a game of tag. When asked, T. indicated

"daddy" taught her to play tag in this manner. Susan Nelson also testified that, about one month later, T. insisted that a picture of Michael Jackson be brought into the bathroom to watch her. T. pointed at her vagina and allegedly said "Michael Jackson doesn't look like this and daddy doesn't look like this either." Susan Nelson asked how she knew this, and the child responded, "I pulled his underpants down."

Susan Nelson became suspicious of possible sexual abuse and retained a psychologist, Dr. Donald McLean, to evaluate and treat T.. Dr. McLean did so in fifty-nine sessions conducted over the course of the next eight months, using a technique known as "play therapy." Essentially, Dr. McLean observed T. in a playroom at his office filled with toys, games and puzzles. Dr. McLean described his role in these sessions as interpreting the "symbolism of play" because "children speak to you in riddles, same sense as interpreting dreams in an adult." The sessions ended on the eve of Brian Nelson's trial.

Dr. McLean was the state's most important witness at trial. His testimony was objected to in a timely manner on the grounds that it was inadmissible hearsay and violated Nelson's right to confront T..

Dr. McLean then proceeded to read almost verbatim his notes from the fifty-nine sessions. He conveyed to the jury his observations and interpretations of T.'s behavior during those sessions. Additionally, he repeatedly testified to numerous out-of-court statements made by T. which tended to indicate that something sexual in nature had happened to her, that "daddy" did it and that daddy was Brian Nelson as opposed to some other male figure. An example of Dr. McLean's testimony follows:

Q. Okay, and would you describe again in detail that session?

A. Well, from my notes, you know, we were sitting on the floor. I can see that I'm trying actually to recall it. There's so many sessions, fifty-nine at

> this point and we're sitting on the floor in the play therapy room. Not engaged in play. I asked her do you pull someone's underpants down. Now I'm quoting from my notes. Do you pull someone's underpants down and touch him where he goes to the bathroom, and the child said yes, and I said where do you touch him. And she reached out and touched the anatomical male doll down through its clothing in the genital area and we're sitting on the floor yet, and I said well, who is it that you touch where he goes to the bathroom, and the child answered Mitch. And I said you told me it was daddy. Was it Mitch or daddy, and the child said daddy. And I said then why do you say it was Mitch, then daddy, then Mitch, then daddy and she answered with he told me to say it was Mitch. I said who told you to say it was Mitch. She said daddy.

When Dr. McLean asked T. whether she would tell only the truth to anyone who talked to her, she replied, "I don't have to tell the truth."

Dr. McLean continually related to the jury the out-of-court statements made by T. in the play therapy sessions, which tended to identify the Petitioner as the perpetrator of the sexual assault. At one point during Dr. McLean's direct examination, the prosecutor indicated she wanted to skip over some of the sessions that did not include statements made by T. about her father.

By Dr. McLean's own admission, he was "crossing between a process of treatment and a process of trying to find out what happened, and like I was collecting evidence." He indicated that he had spoken only to Susan Nelson, T. and Mitch Blada. He did not meet with Brian Nelson or his family, because he did not think it would be helpful. The record shows that Dr. McLean did not question T. about her "not having to tell the truth," and did not pursue the possibility that Blada was the perpetrator of the sexual assault. In fact, Blada testified that he had met with

Dr. McLean the day before the trial and was instructed by Dr. McLean on how to act in court.

Significantly, Dr. McLean had in his possession audio tapes of his sessions with T.. He made them because T. "moved so fast from topic to topic." After the court case began and was pending, Dr. McLean destroyed the tapes. He did so because he thought the judge was going to order him to turn them over.

Another clinical psychologist, Dr. Burton Silberglitt, also testified for the state. He evaluated T. in one session conducted on March 27, 1984. Without objection by trial counsel,[1] Dr. Silberglitt testified that at one point T. stated that she played with her father's "thing" that he put in the toilet. Dr. Silberglitt also testified that T., in referring to her father, stated "that whatever came out of his pants was sticking out and indicated to me, you know, made a motion of an erect penis."

After conviction, the Petitioner exhausted his state remedies. See *State v. Nelson*, 138 Wis.2d 418, 406 N.W.2d 385 (1987). Nelson then sought federal habeas corpus relief. (The Respondent herein is the superintendent of the penal institution where Mr. Nelson was incarcerated at the time the writ was applied for.) On June 10, 1988, the district court held that Nelson had been convicted in violation of his Sixth Amendment confrontation right, finding that at the time of trial, the prosecution had not made an adequate showing that T. was unavailable and that her statements were reliable.

The United States Court of Appeals for the Seventh Circuit, based on 28 U.S.C., Sec. 2241 and 28 U.S.C. Sec. 2253, had jurisdiction to review the final order of the district court granting habeas corpus relief. It did so and reversed the district court, finding that Nelson's confrontation right had not been violated by admission of the out-of-court statements.

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[1]Trial counsel was different than counsel currently representing Mr. Nelson in this proceeding.

REASONS FOR GRANTING WRIT

THE OPINION OF THE SEVENTH CIRCUIT SHOULD BE REVIEWED BECAUSE IT IMPERMISSIBLY EXTENDS THIS COURT'S HOLDING IN *UNITED STATES V. INADI* BEYOND WHAT THE COURT INTENDED AND ALLOWS THE PROSECUTION TO INTRODUCE INTO EVIDENCE CRUCIAL OUT-OF-COURT STATEMENTS MADE FOR PURPOSES OF MEDICAL DIAGNOSIS, WITHOUT A SHOWING THAT THE DECLARANT IS UNAVAILABLE TO TESTIFY.

It is clear that the right to confrontation is an essential and fundamental requirement for a fair trial. *Pointer v. Texas*, 380 U.S. 400, 405 (1965). In *Coy v. Iowa*, 101 L.Ed.2d 857 (1988), this Court recently stressed that the "irreducible literal meaning" of the confrontation clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. *Id.* at 867. There, the Court reversed the defendant's sexual assault conviction because a screen had been placed between him and each of two alleged victims, age 13, during their trial testimony. As the Court indicated, the right to confront one's accuser is so rooted in literature, folklore, legal history and human nature that it is essential to "a system of criminal justice in which the reality as well as the perception of fairness prevails." *Id.* at 865-66. The Court has sometimes referred to this as the symbolic value of the confrontation clause. See, e.g., *Lee v. Illinois*, 476 U.S. 530, 540 (1986).

The Court has also stressed the implications of the confrontation clause—those rights implicit in the clause which function to promote reliability in criminal trials. *Coy*, 101. L.Ed.2d at 866-67; *Lee*, 476. U.S. at 540. The functional value of confrontation serves to: (1) insure that witnesses will give their statements under oath, (2) force the witness to submit to the process of cross-examination, and (3) permit the jury to assess a witness's credibility by observing his demeanor. *Id.*. The most important of the three, and perhaps the essential value of confrontation, is to secure to the accused at least an adequate oppor-

tunity to cross-examine. *United States v. Owens*, 98 L.Ed.2d 951, 956 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986).

Here, Brian Nelson was denied both the symbolic and the functional value of confrontation; his accuser did not testify at trial or at any pretrial or altered courtroom procedure, and all her incriminating hearsay statements made to the psychologist were unsworn and not subject to cross-examination. For the last several years, most courts have held that the right to exclude such statements from a criminal trial could be dispensed with only upon satisfaction of a two-prong test developed by the court in *Ohio v. Roberts*, 448 U.S. 56 (1980): (1) the prosecution must either produce, or demonstrate the unavailability of the declarant whose statement it desires to use against the defendant, and (2) the statements must be marked by adequate indicia of reliability. *Id.* at 65-75.

In *United States v. Inadi*, 475 U.S. 387 (1986), however, the Court indicated that *Roberts* did not map out a theory of the confrontation clause that would determine the validity of all hearsay exceptions and did not stand for the proposition that no out-of-court statement can be introduced by the prosecution without a showing that the declarant in unavailable. *Id.* at 392, 398. Accordingly, the Court held that a showing of unavailability was not required prior to admission, pursuant to Federal Rules of Evidence 801(d)(2)(E), of out-of-court statements made by a co-conspirator. *Id.* at 400.

One rationale behind *Inadi* is that the benefit of confrontation there was outweighed by the burden. The Court found that confrontation of the declarants would have added little to the "truth-determining process" while imposing a substantial burden on the government to attempt to produce every declarant whose name appeared on every tape. *Id.* at 396, 399.

The other rationale is based on the unique nature of co-conspirator statements. Such statements are made while the conspiracy is in progress and provide evidence of the conspiracy's context which cannot be duplicated by in-court testimony. *Id.*

at 395. Co-conspirator statements have evidentiary value independent of the truth of the matter asserted, which lies in the very fact that the statements were made, at a certain time and place, by certain people. *United States v. Molt*, 772 F.2d 366, 368-69 (7th Cir., 1985). Further, they are reliable in the sense that contracts or negotiations among business partners usually portray accurately the affairs of those involved. *Id.*. Thus, co-conspirator statements are irreplaceable as substantive evidence, even if the declarant is available and testifies at trial. *Inadi*, at 394-95.

This retreat from the mechanical application of *Roberts* has caused some uncertainty as to the current status of the unavailability requirement. After *Inadi*, in *Lee v. Illinois*, 476 U.S. 530 (1986) this Court addressed a claimed confrontation violation in the admission of a co-defendant's hearsay confession which inculpated the defendant. Both the majority and the dissent assumed that the unavailability test still had to be satisfied. *Id.* at 539 and 549 n.2 (Blackmun, J. dissenting). Nevertheless, confusion remains. See, e.g., *Nelson v. Farrey*, 688 F. Supp. 1304, 1310-14 (E.D. Wis. 1988); *United States v. Bernard S.*, 795 F.2d 749, 754 (9th Cir. 1986); Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C.L. Rev. 257, 285 (1989).

It is against this background that the Seventh Circuit took a giant leap and held that T.'s unavailability was not a constitutional *"sine qua non"* of allowing her out-of-court statements to be admitted into evidence against Brian Nelson. *Nelson*, 874 F.2d at 1230. The district court had found that the prosecution failed to establish that T. was unavailable and that the prosecution had made a good faith effort to produce her. The Seventh Circuit did not address that finding at length, but rather held that, based on *Inadi*, such a showing is no longer required for admission of statements made for purposes of medical diagnosis.

To the Petitioner's knowledge, the Seventh Circuit opinion is the first to extend *Inadi* this far. Nelson submits that this holding is without support and has disturbing implications for future criminal prosecutions.

Other courts have continued to apply the unavailability requirement to the receipt of hearsay evidence other than co-conspirator statements. The Eighth Circuit has often taken an expansive view of hearsay in child sexual abuse cases, indicating that the confrontation clause should be applied in a pragmatic fashion in order to protect the victim. See, e.g., *United States v. Dorian*, 803 F.2d 1439, 1447 (8th Cir. 1986). See also, *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985); *United States v. Cree*, 778 F.2d 474 (8th Cir. 1985). Nevertheless, in *Dorian* (a post-*Inadi* case) the court continued to require a showing of unavailability prior to admission of the victim's hearsay statements to her mother. *Id.* at 1446.

Similarly, in *Brown v. Dugger*, 831 F.2d 1547, 1551 (11th Cir. 1987), the Eleventh Circuit held that a showing of unavailability was still required prior to admission of an accomplice's statement implicating the defendant.

The intent of the Court in *Inadi* was clearly to indicate that a showing of unavailability was not required when the hearsay evidence at issue was neither crucial nor devastating to the defendant and cross-examination would be of little utility. See, e.g., *United States v. Bernard S.*, 795 F.2d 749, 754 (9th Cir. 1986). Thus, dispensing with the unavailability requirement in a case like *Reardon v. Manson*, 806 F.2d 39 (2nd Cir. 1986) is appropriate. That was a narcotics prosecution in which a state toxicologist referred to tests done by his lab assistants, who did not testify. The court found the tests to be "mechanically objective" in nature and thus cross-examination of the assistants probably would not have established that they were lying when they informed the toxicologist of the results of their tests. *Id.* at 41-42.

In the instant case, the Seventh Circuit essentially took the same position with respect to T.'s statements to Dr. McLean:

> But we should not allow labels and lawyers' pieties to delude us into believing that cross-examination of a four year old child concerning sexual abuse by her

> father a year earlier is a more effective method of discovering the truth than listening to and weighing the testimony of a competent psychologist who interviewed the child over a period of many months in a setting designed to elicit truthful communication.

Nelson, 874. F.2d at 1230.

With this statement, the Seventh Circuit goes far beyond what this Court intended to accomplish in *Inadi*.

As the *Nelson* concurring opinion notes, there is ample basis for distinguishing between the co-conspirator's statements in *Inadi* and statements made for purposes of medical diagnosis and treatment:

> First, I do not believe that statements ordinarily admitted under the medical diagnosis exception derive much significance from the context in which they are made. Unlike the co-conspirator context, the declarant under the medical diagnosis exception is not engaged in an illicit enterprise at the time the statements were made; in fact as in this case, the statements are generally not made when the relevant act is taking place but rather represent the declarant's recollection of past events. In this respect, the statements are akin to trial testimony. Thus, I believe that 'when the declarant takes the stand, his in-court testimony (generally) will reproduce a significant portion of the evidentiary value of the statements.' (Citation omitted)
>
> Second, unlike *Inadi* the status of the typical declarant under this particular exception will not have changed materially between the time the statements were made and the time of trial. The declarant under this exception will generally be a victim not a criminal facing the threat of imminent prosecution, and will usually have no motive to testify falsely about his or her prior statements.

> Finally, in my view, the outcome of *Inadi's* balancing test is reversed when the medical diagnosis exception is involved. In *Inadi* the court emphasised the burden to the entire criminal justice system of adding another tier of appellate review in complex cases and the burden to the prosecution of identifying, locating, and transporting the declarant to trial. These conclusions are premised on the special nature of conspiracies which often involve several individuals scattered throughout a wide area. These factors, however, are not present under the medical diagnosis exception. In a typical case under this exception, there is a single declarant-the victim, who is easily identified and located.

Nelson, 874 F.2d at 1232-33 (Flaum, J., concurring)

The *Nelson* majority incorrectly assesses the value of cross-examination of T. as minimal. There were at least three fertile areas that could have been explored with her: (1) her statement to Dr. McLean that she did not have to tell the truth, (2) her statement to Dr. McLean that Mitch was the perpetrator, and (3) any pressure or undue influence placed upon her by her mother, who had an interest in seeing that Brian Nelson was accused rather than Mitchell Blada.

The bitter divorce between the Nelsons is the type of environment which is ripe for the possibility of a false accusation or, in the words of the *Coy* court, a child coached by a malevolent adult. Unfortunately it is not inconceivable that a child can be used as a pawn in the midst of a hostile relationship. See, e.g., Hopkins "Fathers on Trial," *New York Magazine*, January 11, 1988, p. 42. The false accusation serves a number of purposes—getting even, gaining control over the child, or "getting this guy you hate out of your life forever." *Id.* at 44. Since it appears that Dr. McLean clearly was aligned with Susan Nelson and in fact helped Mr. Blada prepare for his trial testimony, T. was in the best position to explain to the jury what role her mother may have played in, for example, her statement that she did not have to tell the truth.

It strains credibility to suggest that T.'s out-of-court statements were not crucial and devastating to the Petitioner, and merely the equivalent or one of two hundred taped hearsay conversations involving a co-conspirator or a toxicologist report indicating that a tested substance was in fact cocaine.

The Petitioner disagrees that cross-examination of T. would have been of minimal value. As one commentator recently noted:

> [W]here there is evidence as there was in this case that someone other than the defendant may have abused the child, the inability of the defendant's lawyer to pursue that line of questioning with the witness seems to be a major failure. Such failure is not obviated even if it is clear that T. knew she was talking to a physician for the purposes of treatment. Nelson's lawyer might have explored the number of times T. was alone with Mitch, whether she had any conversations with Mitch about the 'truth' and whether the things the psychologist said happened with the father had actually happened with Mitch. In addition, T.'s uncertainty about the obligation to tell the truth is fertile ground for any defense lawyer.

Tuerkheimer, *Convictions Through Hearsay in Child Sexual Abuse Cases: A Logical Progression Back to Square One*, 72 Marq. L. Rev. 47, 54 (1988).

By going outside the confines of this Court's rationale in *Inadi*, the Seventh Circuit's opinion opens the door to the alarming prospect of a sexual abuse trial, or any trial for that matter, conducted solely by the testimony of psychiatrists and social workers relating hearsay statements made by the alleged victim. If *Nelson* and *Coy* are read together, the prosecution has very little incentive to even attempt to produce an accusor for video taped deposition, preliminary hearing, trial or any other procedure where the defendant has an opportunity to cross-examine. *Coy* places stringent restrictions on any attempt to diminish the symbolic value of confrontation in the courtroom; *Nelson*,

on the other hand, dilutes the functional value of cross-examination. In light of *Coy*, the inviting alternative to courtroom testimony by the accusor is the presentation of hearsay through psychiatrists, social workers and other so-called "experts"—witnesses who obviously carry great weight with jurors.

Anyone who believes that hearsay has less persuasive value with a jury than live testimony, and that prosecutors will not present an accusor's testimony through "surrogates" to avoid cross-examination, need only look to the example of the present case as proof that it can and will happen. It is undisputed that the prosecutor here made no effort to attempt to produce T. for trial testimony; during the direct examination of the psychologist, she asked him to skip over the sessions with T. that did not involve statements about her father. The opinion below would permit such a procedure, and thereby opens the door to the presentation of hearsay evidence in a criminal prosecution far wider than the Court intended to in *Inadi*.

CONCLUSION

For all the foregoing reasons the Court is respectfully urged to grant this Petition for a Writ of Certiorari to issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,
HANSON, GASIORKIEWICZ & BECKER, S.C.

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-2292

BRIAN NELSON,

Petitioner-Appellee,

v.

CATHERINE FARREY,

Respondent-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 88 C 35—**Thomas J. Curran**, *Judge.*

ARGUED JANUARY 17, 1989—DECIDED MAY 17, 1989

Before WOOD, JR., POSNER, and FLAUM, *Circuit Judges.*

POSNER, *Circuit Judge.* A Wisconsin jury convicted Brian Nelson of first-degree sexual assault on his daughter, "T.," who had been three years old at the time of the crime. The judge sentenced Nelson to five years in prison. After exhausting his state remedies, see *State v. Nelson*, 138 Wis. 2d 418, 406 N.W.2d 385 (1987), Nelson sought federal habeas corpus. The district court held that he had been convicted in violation of his rights under the confrontation clause of the Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"). 688 F. Supp. 1304 (E.D. Wis. 1988). T. had not testified at

Nelson's trial, but statements that she had made to a psychologist had been admitted into evidence through the psychologist's testimony, improperly in the district judge's view. The state appeals.

A growing sensitivity to the prevalence of child abuse in our society has caused an upsurge of prosecutions. See generally Note, *To Keep the Balance True: The Case of Coy v. Iowa*, 40 Hastings L.J. 437 (1989). Such prosecutions place a strain on traditional notions of procedural justice. See, e.g., Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. Rev. 257 (1989); Tuerkheimer, *Convictions Through Hearsay in Child Sexual Abuse Cases: A Logical Progression Back to Square One*, 72 Marq. L. Rev. 47 (1988). This is especially so when, as in the present case, the crime has left no physical traces, the child is very young and is directly or indirectly the principal witness against the alleged abuser, and the case involves incest, thus pitting child against parent.

Brian and Susan Nelson, T.'s parents, were divorced in 1982, when T. was two years old. Susan received custody of the child, and Brian received visitation rights. According to Susan Nelson's testimony, beginning in August 1983 T. would become apprehensive and even hysterical when Brian Nelson came to pick her up. After one of the visits T. begged her mother not to make her go to her father's house again. By October, T. would go "berserk" when told she was going to her father's house; she would cry and scream and beg not to be forced to go. The visits ceased for a time but resumed around Christmas. Shortly after their resumption, T. tried to pull her mother's pants down while playing tag, explaining that daddy had taught her to play tag this way. T. also insisted to her mother that a picture of Michael Jackson, the popular singer, be brought into the bathroom to watch her. T. pointed to her vagina and said that Michael Jackson doesn't look like this and "daddy doesn't look like this either." When her mother asked her how she knew this, T. replied, "I pulled his underpants down." Susan told T. it

must have been an accident, but T. insisted that daddy had told her to pull down his underpants and that it was all right because Cheryl (the defendant's new wife) was not at home. T.'s visits to her father now ceased for good. Suspecting that Nelson was sexually abusing T., Susan retained Dr. Donald McLean, a clinical psychologist whose name Susan had been given by the domestic relations court when she had asked the court whether she "had to force" T. to visit Brian Nelson.

All this was according to Susan Nelson, to whose testimony the defendant did not object. The spotlight now switches to Dr. McLean, who testified for the state as an expert witness and whose testimony was objected to on the grounds both that it was inadmissible hearsay and that its admission infringed Nelson's constitutional right to confront his accuser.

McLean had held 59 evaluation and treatment sessions with T. between January and September 1984. (The sessions ended on the eve of Brian Nelson's criminal trial; he had been indicted in April.) The sessions were conducted mainly in McLean's "play therapy room," which was equipped with dolls and other toys. "Play therapy" is an established technique for obtaining information about the feelings and problems of young children. See, e.g., Axline, Play Therapy: The Inner Dynamics of Childhood (1947). According to McLean's testimony, T. revealed at several sessions that (in his words) she had "touched daddy where he went to the bathroom." McLean placed "anatomically correct" male and female dolls in the play therapy room and T. in one of the early sessions placed the female doll's face against the male doll's genitalia and said, "she gets mud on her face." Asked what she meant, she replied, "it's white and sticky." T. told McLean that her father had told her not to talk about the incident and also had told her to say that Mitch (Mitchell Blada, who had moved in with Susan after the divorce) had done it.

McLean related the following conversation he had had with T. at one of the sessions: "Do you pull someone's

underpants down and touch him where he goes to the bathroom, and the child said yes . . . and I said, well, who is it that you touch where he goes to the bathroom, and the child answered Mitch. And I said you told me it was Daddy. Was it Mitch or Daddy, and the child said Daddy. And I said then why did you say Mitch, and she said it was Mitch, and I said then it was not Daddy. She said it was Daddy, then Mitch, then Daddy, and she answered with he told me to say it was Mitch. I said who told you to say it was Mitch. She said Daddy." When Dr. McLean asked T. whether she would tell only the truth to anyone who talked to her, she replied, "I don't have to tell the truth." McLean further testified that throughout the sessions T. was very anxious, and that she was both reluctant to talk about the incidents involving her father and very hostile to him. At one session, after again describing fellatio with her father in the bathroom, she became extremely agitated and said she was "mad" at her father. She began beating the male anatomically correct doll and throwing it around the room. She said she was beating "Daddy Brian."

The state called another clinical psychologist, Dr. Burton Silberglitt, as an expert witness. The defendant did not object to his testimony, which was based on a single interview with T. in March 1984. Dr. Silberglitt testified that T. had tried to avoid discussing her father because, in his words, it was "discomforting to her and frightening to her and traumatic to her to get into this." She had, however, told Silberglitt that she "played with his thing that he put in the toilet." Silberglitt also testified that T. had said, referring to her father, that "whatever came out of his pants was sticking out, and [she] indicated to me, you know, made a motion of an erect penis." He also testified that T. was very agitated and required therapy. Another witness who testified for the state without objection was a social worker, Mary Anne Jensen. She testified that in January 1984 T. had drawn a picture of herself and her father. The picture, which was admitted into evidence without objection, depicts the defendant as an erect penis.

When the state rested its case, Nelson moved for dismissal on the ground that the testimony about what T. had said was hearsay and that the state had failed to show that T. was unavailable to testify either in person or, at the very least, through a videotape of the play therapy sessions; therefore the admission of the hearsay violated his right of confrontation. (But of course a videotape would not have cured the absence of confrontation.) The judge denied the motion to dismiss, ruling that T.'s age—four at the time of trial—and the testimony of the two psychologists concerning the traumatic impact on her of having to testify about her father's conduct made her unavailable to testify at trial, and concluding that therefore her out-of-court statements were admissible.

The trial then resumed, and two psychologists testified for the defense. Dr. David Nichols, who had interviewed T. in March 1984 at Nelson's request, testified that the interview had revealed little about the alleged sexual assaults but that T. had told him that she did not like to visit her father and that she "gets white mud on her face." Nichols had concluded that sexual abuse had occurred, and had recommended to the domestic relations court that Nelson not be permitted to visit with T. The other psychologist, Dr. Walter McDonald, had not interviewed T. but had examined Dr. McLean's clinical notes. McDonald agreed that T. was suffering from anxiety, anger, and trauma, but speculated that her increasing sexual preoccupation during the therapy sessions with McLean might have been a consequence of the presence of anatomically correct dolls. He acknowledged, however, that this theory was no more plausible than McLean's, which was that the defendant *had* sexually abused T.

After the trial, Nelson asked the trial judge to set aside his conviction, and in April 1985 the judge held an evidentiary hearing to determine once again whether T. had been unavailable to testify at the trial. The only witness called by either side was Dr. McLean (the state called him), who testified that T. would not have responded to direct questioning about the sexual contacts with her father, that such questioning could have had a traumatic effect on her, that she was fearful of her father, and that his presence in the courtroom while she testified would have harmed her psychologically. McLean acknowledged that therapy sessions with T. could have been videotaped but pointed out that a large number of the sessions would have had to be taped, because she had volunteered information about the sexual incidents with her father only gradually and intermittently. Nelson declined to present any evidence on the question of T.'s availability to testify at his trial, arguing that the seven-month lapse of time between the trial and the hearing prevented him from adducing meaningful evidence. The judge disagreed, and concluded that T. had indeed been unavailable to testify at trial.

Whether the Supreme Court of Wisconsin correctly found that the admission into evidence of T.'s statements to Dr. McLean did not violate Wisconsin's hearsay rule is an issue of state law; it is nothing to us. The only question for us is whether the admission of those statements, as the district court believed, denied Brian Nelson his Sixth Amendment right (held applicable to state prosecutions in *Pointer v. Texas*, 380 U.S. 400, 403-04 (1965)) to confront the witnesses against him. In a literal sense it did not, since T. was not a witness. The prosecution witnesses were Nelson's ex-wife, the two psychologists called by the state, and the social worker. Nelson had every opportunity to confront *them*—to look them in the eye and make them quail under his righteous gaze. This case is not like *Coy v. Iowa*, 108 S. Ct. 2798 (1988), where the child witnesses testified behind a screen that prevented the defendant from establishing eye contact with them. It is true that T. was an indirect witness, but if the per se rule of *Coy* were extended to indirect witnesses—that is, to out-of-court declarants—the effect would be to outlaw all hearsay evidence, something the Supreme Court plainly is not minded to do.

If the literal sense of the confrontation clause were its only sense, Nelson would have no case. He would be en-

titled to confront only those persons who actually testified at his trial, and T. was not one of them. But interpreted literally the clause could easily be evaded: instead of calling eyewitnesses to a crime to testify, the state could put on witnesses who would merely recite what those eyewitnesses had told them. This might not be the end of the world. The defendant might be able to use his Sixth Amendment right of compulsory process (held applicable to the states in *Washington v. Texas*, 388 U.S. 14 (1967)) to get the eyewitnesses into court, where he could confront them. See Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 183 (1974). Of course, this would require a nonliteral reading of the compulsory process clause, which as written merely entitles the defendant "to have compulsory process for obtaining witnesses *in his favor*" (emphasis added), and we are speaking here of *prosecution* witnesses. This approach would also require that the compulsory process clause be read to have abrogated the common law rule that forbids a party to impeach any witness called by him; in other words it would require constitutionalizing Rule 607 of the Federal Rules of Evidence. *Chambers v. Mississippi*, 410 U.S. 284 (1973), suggests that the voucher rule does indeed violate the Sixth Amendment—but the confrontation clause, not the compulsory process clause. Additional interpretation would be required to expand the compulsory process clause from a help in mounting a defense (see, e.g., *Pennsylvania v. Ritchie*, 480 U.S. 39, 55-56 (1987); *United States v. Davis*, 772 F.2d 1339, 1347-48 (7th Cir. 1985)) to a help in confronting the prosecution's nontestifying witnesses. See *United States v. Oates*, 560 F.2d 45, 82 n. 39 (2d Cir. 1977). This may be why *Chambers* suggests that the voucher rule, which limits the defendant's ability to cross-examine eyewitnesses whom the prosecution declines to call, offends against the confrontation clause rather than against the compulsory process clause. There is no escaping the uncertainties of interpretation by switching the focus from the confrontation clause to the compulsory process clause.

At all events the law has developed along different lines. The confrontation clause has been held not only to entitle the criminal defendant to confront (literally) and cross-examine the witnesses whom the prosecution does call, but also to place limits on the prosecution's use of hearsay evidence. But it is not clear what those limits are. In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Supreme Court said that hearsay evidence was inadmissible against a criminal defendant unless the declarant was unavailable to testify *and* the hearsay evidence was reliable; moreover, evidence that did not fit within a well-established exception to the common law rule excluding hearsay evidence would be deemed reliable only if it had "particularized guarantees of trustworthiness." *Id.* at 66. The Court hedged the requirement of unavailability, however, by prefacing it with the statement: "In the usual case," *id.* at 65—rather a backhanded allusion to the fact that Rule 803 of the Federal Rules of Evidence contains 24 exceptions to the requirement that the declarant be unavailable to testify in order for hearsay to be admissible, and presumably the Constitution imposes looser rather than tighter limitations on the use of hearsay evidence than the Federal Rules of Evidence. Six years later the Supreme Court disavowed any suggestion that *Roberts* had stated a general rule, confined the case to the particular situation presented by it—a prosecutor's attempt to use the transcript of testimony from a previous judicial proceeding in lieu of live testimony at trial—and allowed the admission of out-of-court statements by a co-conspirator who was available to testify. See *United States v. Inadi*, 475 U.S. 387 (1986).

At present, then, there is no single authoritative criterion for when the admission of hearsay evidence violates a defendant's constitutional right to confrontation. We can imagine two possible approaches. One would be to confine the right to situations in which the prosecutor appears to be trying to circumvent the literal right of confrontation (the right vindicated in *Coy*) by presenting evidence at second hand, as in the hypothetical eyewitness

case that we gave earlier, or in the *Roberts* case itself. As noted by Justice Harlan in a scholarly concurring opinion in *California v. Green*, 399 U.S. 149, 180 (1970), "the early decisions that consider the confrontation right at any length all involved ex parte testimony submitted by deposition and affidavit." "[T]he paradigmatic evil the Confrontation Clause was aimed at [was] trial by affidavit." *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring). See also *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). Trial by affidavit conjures up the image of inquisitorial procedure, and in this light *Coy* can be understood as a symbolic vindication of the adversary character of Anglo-American criminal procedure—symbolic because the trial of Coy was neither a trial by affidavit nor an inquisitorial-type proceeding. See *The Supreme Court, 1987 Term: Leading Cases*, 102 Harv. L. Rev. 143, 158-59 (1988). Admittedly that is not the timbre of the *Coy* opinion. The Court's emphasis is on the etymology of "confrontation" rather than on the symbology of the adversarial process. See 108 S. Ct. at 2800. But the Court was not dealing with a case in which the state had attempted to substitute an inquisitorial process for the adversary process that is the norm in Anglo-American criminal justice.

Under what we are calling the "symbolic" approach a heavy emphasis would be placed on the out-of-court declarant's unavailability to testify. For if he were available yet not called, it would look as if the state were trying to circumvent the adversarial process gratuitously.

The other approach, which is functional rather than either symbolic or literal, which focuses on cross-examination rather than (more precisely, in addition to) the making of eye contact with the prosecution's witnesses, and which also has considerable support in the cases, see, e.g., *Olden v. Kentucky*, 109 S. Ct. 480, 483 (1988) (per curiam), is to forbid the admission of hearsay evidence so likely to be unreliable that it threatens a miscarriage of justice, which is to say, the conviction of an innocent person. See, e.g., *Lee v. Illinois*, 476 U.S. 530 (1986). The declarant's

availability or unavailability is relevant under this approach only insofar as it bears on the appropriateness, in particular circumstances, of introducing evidence potentially less reliable than that of a witness testifying about his first-hand knowledge. On this approach the declarant's unavailability cuts both ways: it makes the admission of the out-of-court statement more needful, because the prosecution can't get the declarant to testify in person, but it also makes cross-examination of the declarant impossible.

Under either approach, Nelson must lose. Begin with the symbolic approach. The prosecutor was not trying to present T.'s testimony through surrogates so that Nelson would not be able to look her in the eye at trial or cross-examine her. There was no attempt to circumvent adversary process. Whether or not T. was "unavailable" in the sense in which this term is used in Rule 804 of the Federal Rules of Evidence or in its Wisconsin counterpart—and bear in mind that "unavailable" doesn't mean dead or a fugitive, but includes fearing for one's life, as in *United States v. Boulahanis*, 677 F.2d 586, 588 (7th Cir. 1982), or risking incriminating oneself, as in *United States v. Silverstein*, 732 F.2d 1338, 1346 (7th Cir. 1984)—Nelson does not suggest that the prosecutor had improper motives in failing to call T. as a witness, or even that a reasonable observer would have ascribed such motives to the prosecutor. Dr. McLean testified that T. would resist direct questioning about sexual incidents with her father. To elicit truthful answers, he opined, would have required protracted inquiry in a relaxed setting—conditions impossible to create in a courtroom with T.'s father present. The attempt to extract evidence from her in a courtroom setting was likely to be not only futile but also psychologically harmful to her.

Turning to the second approach, the functional, we ask whether the evidence of what T. had told other people—her mother, the three psychologists (including Dr. Nichols, one of the defendant's expert witnesses) who interviewed her, and the social worker—was sufficiently reliable to still

concerns that Nelson may have been the victim of a miscarriage of justice. The Wisconsin courts thought it was, and so do we. Remember that the only challenged testimony is that of Dr. McLean. The other hearsay evidence, much of it as damning as McLean's, was admitted without objection. Some of that evidence was given by Dr. Nichols, who was Nelson's own witness. The hearsay evidence that was admitted without objection provided strong corroboration for the statements that T. had made to Dr. McLean. The only suggestion that she might have fabricated her account of sexual abuse was Dr. McDonald's testimony that playing with anatomically correct male and female dolls might have caused T. to become preoccupied with sex. McDonald is not alone in being concerned that the use of such dolls "will stimulate fantasy and not recall," Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 Wash. L. Rev. 705, 711 (1987), but that concern is misplaced in the circumstances of the present case. For there cannot be any serious doubt that *someone* coerced T. into committing fellatio with him. Merely playing with anatomically correct dolls would not have given her the idea that one might be sprayed in the face with "white mud" from an erect penis; the dolls aren't *that* anatomically correct. The experience that T. narrated must have happened. The only question is whether Mitch or her father was the molester. And Dr. McDonald did not suggest that Mitch and Susan had attempted to frame Daddy Brian.

The question is not whether T.'s statements to McLean were in fact completely truthful and accurate, although the evidence admitted without objection makes it highly probable that they were. (And it appears that children rarely fabricate reports of sexual abuse. See Note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U.L. Rev. 155, 175-76 (1988); Comment, *Child Witnesses in Sexual Abuse Proceedings: Their Capabilities, Special Problems, and Proposals for Reform*, 13 Pepperdine L. Rev. 157, 158-60 (1985); Note, *A Comprehensive Approach to Child Hearsay Statements in Sex*

Abuse Cases, 83 Colum. L. Rev. 1745, 1751-53 (1983)—all reviewing empirical studies.) The question is whether allowing the statements into evidence created a serious danger of a miscarriage of justice. Dr. McLean is a qualified psychologist who treated T. over a period of months, conducted dozens of therapy sessions with her, and employed his professional skills in an attempt to elicit truthful statements. No one pretends that such a sifting process is infallible, but we are given no reason to suppose that it is so unreliable that a jury should be forbidden to consider it. If such evidence were never admissible, molesters of small children, especially incestuous molesters, would rarely be punished. It would have been a monstrous cruelty to force T. to testify—in a public courtroom, in the presence of the father she feared—to sexual abuse by her father. Who can believe that such a confrontation would have been more likely to elicit truth than to produce sordid drama?

The alternative suggested by the defendant—videotaping the therapy sessions—would not have been feasible. The sessions began before Dr. McLean knew that a criminal trial would ensue, so he can hardly be faulted for not having videotaped them from the start. And surely his clients would be shocked if he had a routine practice of videotaping therapy sessions with child victims of sexual abuse. Had he begun videotaping the sessions with T. after the defendant was charged (we don't know when McLean was informed that criminal charges were pending against the defendant), the defendant would now be objecting that the videotape evidence was unreliable because the earlier sessions had not also been videotaped. Then there is the problem of editing. A videotape of all the sessions would run many hours and be unbearably diffuse and tedious, but an edited version would tend to magnify the impact of T.'s statements about sexual abuse. Finally, since a videotape cannot be cross-examined and since Nelson does not question the accuracy of McLean's testimony (as distinct from the accuracy of the statements by T. to which McLean testified), the videotape evidence would not have assisted the defense. Indeed, the defense might well have

been hurt by the jury's seeing the little girl; it would have made the enormity of the defendant's crime more vivid.

Events conspired to prevent Brian Nelson from having a chance to cross-examine his principal accuser. He *was* convicted on hearsay evidence. But we should not allow labels and lawyers' pieties to delude us into believing that cross-examination of a four-year-old child concerning sexual abuse by her father a year earlier is a more effective method of discovering the truth than listening to and weighing the testimony of a competent psychologist who interviewed the child over a period of many months in a setting designed to elicit truthful communication. There is no basis for believing that T.'s testifying would have enhanced the accuracy of the jury's determination. "[A] growing number of experts argue that the testimony of child-abuse victims is more reliable if they *cannot* see the defendant," *The Supreme Court, 1987 Term: Leading Cases*, *supra*, 102 Harv. L. Rev. at 157 (emphasis in original; footnote omitted); for empirical support see Note, *Videotaping Children's Testimony: An Empirical View*, 85 Mich. L. Rev. 809, 814-17 (1987). There is no basis for believing that the evidence which the jury did have was insufficiently reliable to support a criminal conviction. See *United States v. St. John*, 851 F.2d 1096 (8th Cir. 1988); *Morgan v. Foretich*, 846 F.2d 941, 946 (4th Cir. 1988); *United States v. Cree*, 778 F.2d 474, 477-78 (8th Cir. 1985); *United States v. Nick*, 604 F.2d 1199, 1204 (9th Cir. 1979)—all cases upholding the admission of out-of-court statements made by child victims of sex abuse.

Burns v. Clusen, 798 F.2d 931 (7th Cir. 1986), on which Nelson relies heavily, does not compel a contrary result. Granted, "a witness cannot be declared 'unavailable' simply because the prosecutor or [trial] court concludes that the witness might not want to testify," *id.* at 942, and maybe that was such a case. This case cannot be so characterized. The victim in *Burns* was an adult with a fluctuating mental condition, and the only determination of her availability to testify was made two months before the trial, whereas here the trial judge's post-trial

hearing determined that at the time of trial T. had been incapable of testifying without risk of serious psychological harm. Anyway T.'s unavailability was not a constitutional sine qua non of allowing her out-of-court statements to be used in evidence against her father. And how ironic it would be if the child molester could use the trauma inflicted on his victim as the fulcrum for levering his way to freedom.

The judgment of the district court is reversed with directions to deny the application for habeas corpus.

REVERSED.

FLAUM, *Circuit Judge*, concurring.

I concur in the judgment of the court reversing the grant of the writ of habeas corpus. I write separately to set forth my views on the appropriate method of analysis in determining whether the admission of T's statements to Dr. McLean conformed to the requirements of the Confrontation Clause. In particular, I do not agree with the majority's assertion that "T's unavailability was not a constitutional sine qua non of allowing her out of court statements to be used in evidence against her father." Rather, I believe that the Confrontation Clause required the prosecution to show that T was not available to testify at trial and that the statements themselves had particularized guarantees of trustworthiness. In my view, the prosecution has complied with both requirements. Consequently, I believe that the admission of T's statements through Dr. McLean did not violate the defendant's sixth amendment rights.

I.

In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Supreme Court appeared to fix both the unavailability of the declarant and the reliability of the statement as enduring

lodestars in Confrontation Clause cases. In *Roberts*, a case involving testimony given at a preliminary hearing, the Court stated that generally, "the prosecution must either produce, or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant." *Id.* at 65. The Court, however, emphasized that a showing of unavailability is not required in all situations. *Id.* at 65 n.7.

The general language contained in *Roberts* prompted many courts to conclude that a demonstration of the declarant's unavailability was a constitutional pre-condition to the admission of most hearsay statements. *See United States v. Caputo*, 758 F.2d 944, 950 n.2 (3rd Cir. 1985) (collecting cases). The validity of this interpretation of *Roberts*, however, is suspect in view of *United States v. Inadi*, 475 U.S. 387 (1986). The precise holding in *Inadi* was that no unavailability showing is required when statements are admitted pursuant to Federal Rule of Evidence 801(d)(2)(E)—co-conspirator statements made during the course and in furtherance of the conspiracy. The Court justified this result on three grounds. First, the Court found that these statements derive much of their significance from the context in which they are made and that this context cannot be replicated at trial. *Id.* at 395. Second, the Court noted that the declarant will often have a motive to testify falsely about the statements in view of the specter of imminent indictment or prosecution. *Id.* Finally, the Court emphasized that the benefit to the defendant of having a co-conspirator testify is minimal and is substantially outweighed by the burden to the prosecution resulting from an unavailability requirement. *Id.* at 396-400. In the course of the opinion, however, the Court employed language that could be interpreted as repudiating the unavailability discussion in *Roberts*.

The *Inadi* decision has created an unfortunate vacuum in the Confrontation Clause realm, for at present it is not clear if a showing of unavailability is required for most types of hearsay statements. *See Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diag-*

nosis or Treatment, 67 N.C.L. Rev. 257, 289 n.9 (1989). Given its broadest construction, *Inadi* stands for the proposition that the unavailability of the declarant is a relevant constitutional factor only when the hearsay statements involve testimony given at a preliminary hearing. In my view, however, *Inadi* does not represent a repudiation of *Roberts'* unavailability discussion. Rather, I believe that *Inadi* merely reaffirms and applies the *Roberts* principle that a showing of unavailability is not required in all situations. See *Lee v. Illinois*, 476 U.S. 530, 549 n.2 (1986) (Blackmun, J., dissenting). Thus, to me, *Inadi* represents a directive to lower courts to carefully analyze the facts of a given situation before concluding that a showing of unavailability is constitutionally required. Moreover, I believe that *Inadi* provides us with the factors to be used in making this determination—significance of the context in which the statements were made, potential change in the status of the declarant, burden to the prosecution of demonstrating unavailability and benefit to the defendant of having the declarant testify.

The delineation of these factors does not of course end the inquiry, for the question of application remains. In my view, there are two possible approaches to this problem although both lead to the same result in the present case. The first approach, which may be termed the case-by-case approach, involves analyzing the facts of a particular case in terms of the criteria delineated in *Inadi*. Under this approach, I believe that the state was constitutionally required to demonstrate T's unavailability. Unlike *Inadi*, T's statements were not made during the course of the critical event but rather represented her recollection of past events. Thus, it cannot be said that the statements derived much of their significance from the context in which they were made. Second, T's status did not change appreciably in the interval between the making of the statements and the trial—T was a little girl who was not facing the threat of prosecution and had no motive to testify falsely at trial. Third, the burden to the prosecution of producing T or demonstrating her unavailability

was not substantial. T was readily identified and located and could have easily been transported to trial. Conversely, the benefit to the defendant of having T testify at trial was substantial. T's statements went to the essential issue in the case—the identity of the abuser. Moreover, T was the only individual who had the opportunity to observe the abuser and, in fact, gave conflicting accounts of his identity. Under these circumstances, T's testimony at trial could have been critical to the defendant for if T repudiated her identification of the defendant on the stand, in all probability a judgment of acquittal would have been entered.

The case-by-case approach is appealing in the abstract, for in theory, it should accurately identify the cases where a showing of unavailability would be pointless. On further reflection, however, significant problems with this approach emerge. In particular, I believe that a case-by-case approach will engender a great deal of uncertainty in a critical area of the law. Thus, neither party will know prior to trial whether a showing of unavailability will be required. Consequently, the prosecution may in fact expend a great deal of effort in order to produce a declarant only to discover that the presence of the declarant at trial was not required. Moreover, it will often not be possible for the trial judge to accurately evaluate the *Inadi* factors at the time the prosecution offers the statements. In particular, the benefit to the defendant of the declarant's testimony may not become apparent until other witnesses testify.

A second possible approach would link the unavailability requirement to the particular hearsay exception. Under this approach, a determination that a statement fits within the medical diagnosis exception will necessarily dictate a particular result on the unavailability issue. By its terms, this approach demands assumptions about the nature of evidence admitted under the particular exception in criminal cases and the identity of the typical declarant. These assumptions in turn are to be evaluated in light of the criteria delineated in *Inadi*. As with all generalizations, there is always the possibility of an erroneous result in

a particular case. In my view, however, the danger of erroneous results when this exception is involved is slight and is substantially outweighed by the certainty that this approach would provide. The need for certainty, a primary goal of Confrontation Clause jurisprudence, *see Ohio v. Roberts*, 448 U.S. 56, 66 (1980), is particularly acute in the case of this particular exception for the medical diagnosis exception is being used with increasing frequency in prosecutions for child abuse. *See United States v. Shaw*, 824 F.2d 601 (8th Cir. 1987); *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985); *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980); *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979).

As noted above, the Supreme Court in *Inadi* identified several factors in determining that the prosecution need not demonstrate the declarant's unavailability when statements fall under 801(d)(2)(E)—significance of the context in which the statements were made, potential change in the status of the declarant, burden to the prosecution of producing the declarant, and minimal benefit to the defendant of having the declarant testify. In my view, these factors are inapposite to the typical case involving Rule 803(4) or its state counterpart. Consequently, I would hold that when statements are admitted pursuant to the medical diagnosis exception to the hearsay rule, a showing of unavailability is always required.

First, I do not believe that statements ordinarily admitted under the medical diagnosis exception derive much significance from the context in which they are made. Unlike the co-conspirator context, the declarant under the medical diagnosis exception is not engaged in an illicit enterprise at the time the statements were made; in fact as in this case, the statements are generally not made when the relevant act is taking place but rather represent the declarant's recollection of past events. In this respect, the statements are akin to trial testimony. Thus, I believe that "when the declarant takes the stand, his in-court testimony [generally] will reproduce a significant

portion of the evidentiary value of the statements." *Inadi*, 475 U.S. at 395.

Second, unlike *Inadi*, the status of the typical declarant under this particular exception will not have changed materially between the time the statements were made and the time of trial. The declarant under this exception will generally be a victim not a criminal facing the threat of imminent prosecution, and will usually have no motive to testify falsely about his or her prior statements.

Finally, in my view, the outcome of *Inadi's* balancing test is reversed when the medical diagnosis exception is involved. In *Inadi*, the Court emphasized the burden to the entire criminal justice system of adding another tier of appellate review in complex cases and the burden to the prosecution of identifying, locating and transporting the declarant to trial. These conclusions are premised on the special nature of conspiracies which often involve several individuals scattered throughout a wide area. These factors, however, are not present under the medical diagnosis exception. In a typical case under this exception there is a single declarant,—the victim, who is easily identified and located.

On the other hand, the value of the testimony by a declarant under this exception is generally substantial. As noted above, the typical declarant under this exception is the victim, and generally is the only individual with first-hand knowledge of the crime. Moreover, the statements themselves generally involve central issues in the case such as identity, *United States v. Renville*, 779 F.2d 430, 437 (8th Cir. 1985), cause, *United States v. Nick*, 604 F.2d 1199, 1201-02 (9th Cir. 1979) or fact of injury. Given these facts, in most cases the appearance of the typical declarant under the medical diagnosis exception is of great value to the defendant for by discrediting the declarant's testimony, the defendant necessarily casts doubt upon the principal evidence in favor of the prosecution.

Thus, under either a case by case or exception by exception approach, I believe that the Confrontation Clause

required the prosecution to demonstrate T's unavailability as a condition to the admission of the statements through Dr. McLean. Having said this, I nevertheless conclude that the prosecution has succeeded in demonstrating that T was unavailable. I do not reach this conclusion due to T's age. While the fact that T was three years old at the time of trial is certainly a relevant factor in determining unavailability, it is not in my view dispositive since extremely bright, verbal three year olds can provide meaningful testimony at trial. *See e.g., United States v. Frazier*, 678 F. Supp. 499 (E.D. Pa. 1986). Rather, I believe that the prosecution clearly established that T could not provide meaningful testimony about the alleged assault. The testimony of Dr. McLean, the only professional who had significant contact with T, indicated that the victim, even on the eve of trial strongly resisted making any statements about her father. Moreover, the defendant introduced no evidence that even obliquely questioned the validity of this assertion. Given these facts, I believe that the prosecution established that T was not available to testify at trial.

II.

In addition to establishing T's unavailability the prosecution also had to demonstrate that the statements had sufficient indicia of reliability. In *Roberts*, the Court held that the reliability requirement could be satisfied in two ways. First, "reliability could be inferred without more when the evidence fell within a firmly rooted hearsay exception." 448 U.S. at 66. Second, even if the evidence did not come within a firmly-rooted exception, reliability could be shown if the evidence had particularized guarantees of trustworthiness." *Id.*

In *Bourjaily v. United States*, 107 S.Ct. 2775 (1987), the Supreme Court elucidated the meaning of the term "firmly-rooted." There, the Court held that a firmly-rooted hearsay exception is one that has "a long tradition of being outside the compass of the general hearsay exclusion."

Id. at 2783. Thus, the test of "firmly-rooted" is simply the longevity of the exception's existence. The Court noted, however, that when the evidentiary rule deviates from the common law approach an independent reliability inquiry is required. *Id.*

The Wisconsin Supreme Court held that T's statements identifying the defendant as the abuser fit within the medical diagnosis or treatment exception to the hearsay rule and the validity of this interpretation is not an issue in this habeas corpus case. At common law, the admission into evidence of statements made to others for purposes of treatment was a well-established practice. *See United States v. Nickle*, 60 F.2d 372, 373-74 (8th Cir. 1932). The common law version of this exception, however, did not embrace statements of fault; the admission of these types of statements under this particular exception is the product of the Federal Rules of Evidence (enacted in 1974) and recent court decisions. *See People v. LaLone*, No. 79221 (Mich. Sup. Ct. March 30, 1989) (Lexis, States Library, Mich. File). Since this development represents a marked deviation from and expansion of the common law approach, *Bourjaily* dictates that an individualized examination into the reliability of T's statements is required.

As noted above, under the second *Roberts* test statements are admissible if they have particularized guarantees of trustworthiness. In my view these guarantees are present in this case. First, as the majority notes, the graphic description of the nature of the abuse in childlike language clearly established that sexual abuse had taken place. Second, T told several other individuals who testified at trial that the defendant had abused her. Finally, shortly after the alleged acts had taken place, T began manifesting an abnormal and uncharacteristic terror at the prospect of seeing her father. Given these facts, I believe that T's statements to Dr. McLean identifying the defendant as the abuser had particularized guarantees of trustworthiness within the meaning of *Roberts*.

In sum, I believe that the prosecution was required to show that T was not available to testify at trial and that the statements she made to Dr. McLean had particularized guarantees of trustworthiness. In my view, the prosecution satisfied both of these requirements. Consequently, I agree with the majority that the admission of T's statements to Dr. McLean at trial did not violate the defendant's sixth amendment rights.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

Case No. 88-C-35

BRIAN NELSON,
Petitioner,
v.
CATHERINE FERREY,
Respondent.

DECISION AND ORDER

Brian Nelson, the petitioner in the above-captioned action, is a prisoner in state custody who is seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. After a trial by jury in the Racine County [Wisconsin] Circuit Court, Nelson was convicted of one count of first degree sexual assault in violation of section 940.225(1)(d) of the Wisconsin Statutes.[1] He is currently serving a five year sentence at the Oakhill Correctional Institute where he is in the custody of respondent Catherine Ferrey. This court, which is located in the district where Nelson was convicted, is empowered to consider the petition under 28 U.S.C. § 2241(d).

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[1]Section 940.225(1)(d) of the Wisconsin Statutes provides that:

> Sexual assault. (1) FIRST DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class B felony:
>
> . . . .
>
> (d) Has sexual contact or sexual intercourse with a person 12 years of age or younger.

I. STATE PROCEEDINGS

Following the denial of his posttrial motions in state court, Nelson challenged his conviction in the Wisconsin Court of Appeals which affirmed the trial court in an unpublished decision. *See State v. Nelson*, No. 85-1125-CR (Wis. Ct. App. April 23, 1986), *aff'd*, 138 Wis. 2d 418, 406 N.W.2d 385 (1987). The Wisconsin Supreme Court then granted review and confirmed the conviction in a 4-3 decision. *See State v. Nelson*, 138 Wis. 2d 418, 406 N.W.2d 385 (1987). Wisconsin's Supreme Court recounted the following facts leading up to Nelson's conviction and sentencing:

> In April of 1984 the defendant, Brian Nelson, was charged with one count of intentionally and feloniously having sexual contact with a person twelve years or younger. The alleged victim of the sexual assault was his daughter, T.N., who was born June 7, 1980. At trial the state presented no eyewitness testimony and did not call T.N. to testify. Instead, the evidence of sexual assault and the evidence linking Brian Nelson to the sexual assault were presented primarily through the testimony of T.N.'s mother, Susan Nelson, T.N.'s treating psychologist, Dr. McLean, and a second psychologist, Dr. Silberglitt.
>
> In April of 1982, Brian and Susan Nelson were divorced. Susan Nelson was granted custody of their daughter, T.N., and the defendant was granted reasonable visitation rights. Shortly after the divorce was finalized, Mitchell Blada moved in with Susan Nelson and T.N. Susan Nelson testified at trial that beginning in August, 1983, T.N. became apprehensive and at times hysterical when the defendant came to pick her up for visitation. According to Susan Nelson, after a visit with the defendant in early August, 1983, T.N. begged not to return to her father's residence. Susan Nelson testified that by October, when she would inform T.N. that T.N. was going to her father's house,

T.N. would go "berserk." She would cry and scream, and beg not to go. At this point visitations essentially stopped.

At Christmas, visitation was resumed without incident. However, Susan Nelson testified that shortly thereafter T.N. attempted to pull her mother's pants down while playing a game of tag. According to Susan Nelson, T.N. indicated that daddy had taught her to play tag in this manner. Susan Nelson also testified that on January 20, 1984, T.N. insisted that a picture of Michael Jackson be brought into the bathroom to watch her. T.N. pointed at her vagina and said that Michael Jackson doesn't look like this and "daddy doesn't look like this either." Susan Nelson testified that, when she asked T.N. how she knew this, T.N. responded, "I pulled his underpants down." When Susan Nelson told T.N. that it must have been an accident, T.N. insisted that daddy told her to pull down his underpants and that it was alright because Cheryl, the defendant's second wife, was not at home.

Susan Nelson became suspicious of possible sexual abuse and contacted Dr. McLean to discuss whether there was a possibility of sexual abuse. Susan had previously been given Dr. McLean's name when she called the court to find out if she "had to force" T.N. to visit the defendant.

Dr. Donald McLean, a clinical psychologist, was called by the state and was qualified by the court as an expert witness in the field of psychology. Dr. McLean's notes had been provided to the defense prior to trial. Defense counsel, outside the presence of the jury, objected on hearsay grounds to Dr. McLean's anticipated testimony concerning statements made by T.N. In explaining the objection, defense counsel stated: "Now, the basic problem with this, as I see it, is that there is a witness then to whom we are denied

a right of confrontation." The trial court ruled that the statements made by T.N. were admissible under sec. 907.03, Stats.,[2] since they formed the basis of an expert opinion. The trial court did not rule on the confrontation issue, and defense counsel did not repeat the objection.

Dr. McLean testified to a series of fifty-nine evaluation and treatment sessions with T.N. from January 25, 1984, to September 11, 1984. The treatment sessions were generally conducted in Dr. McLean's play therapy room, although Dr. McLean occasionally spoke with T.N. in his regular office. The play therapy room was set up with games, puzzles, coloring books, dolls, and other toys which allow a child to express oneself through play.

Dr. McLean testified that T.N. had revealed at a number of sessions that she had touched daddy where he went to the bathroom. According to Dr. McLean, he placed anatomically correct male and female dolls in the play therapy room on February 27, 1984. Dr. McLean testified that at the February 28 session, T.N. placed the female doll's face against the genital area of the male doll and said, "she gets mud on her face." Upon being asking what she meant, T.N. replied, "its white and sticky." Dr. McLean testified that in a subsequent session T.N. told him that her father warned her not to talk about the incident and also told her to say that Susan's boyfriend, Mitch, did it.

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[2]Section 907.03 Stats., provides: "Bases of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

Dr. McLean related the following conversation with T.N. "Do you pull someone's underpants down and touch him where he goes to the bathroom, and the child said yes . . . and I said, well who is it that you touch where he goes to the bathroom, and the child answered Mitch. And I said you told me it was Daddy. Was it Mitch or Daddy, and the child said Daddy. And I said then why did you say Mitch, and she said it was Mitch, and I said then it was not Daddy. She said it was Daddy, then Mitch, then Daddy, and she answered with he told me to say it was Mitch. I said who told you to say it was Mitch. She said Daddy." Dr. McLean further testified that, when he asked T.N. if she would only tell the truth to anyone who talks to her, she responded, "I don't have to tell the truth."

Dr. McLean also testified that throughout the treatment T.N. was extremely anxious and reluctant to talk about the incident and that at times T.N. would appear depressed and emotionally drained.

Dr. Burton Silberglitt, a clinical psychologist, was also called by the state as an expert witness. The defense raised no objection to this testimony which was based on one session conducted on March 27, 1984. Dr. Silberglitt testified that T.N. tried to ignore discussing her father because it was "discomforting to her and frightening to her and traumatic to her to get into this." According to Dr. Silberglitt, when he brought up T.N.'s father, the child stated that she "played with his thing that he put in the toilet." Dr. Silberglitt further testified that T.N. was very agitated and that it was his recommendation that T.N. engage in therapy with a qualified therapist.

Mary Anne Jensen, a social worker for Racine County, was also called to testify. She testified that on January 29, 1984, T.N drew a picture which depicted herself and her father. The pictures were marked as

exhibits and shown to the jury. Mary Anne Jensen offered an explanation of the drawing's significance. However, in the opening statement to the jury, the state told the jury that the picture drawn by T.N. depicted the defendant as an erect penis. The defense raised no objection to this statement.

At the close of the state's case, the defense made a motion to dismiss, and argued, first, that the hearsay statements of T.N. as related by the psychologists were inadmissible because no expert opinion had been offered and, second, that defendant's right of confrontation had been violated because the state had not shown that T.N. was unavailable as a witness. The state responded that the testimony of two psychologists demonstrated that T.N. had suffered a severe trauma because of her sexual experiences with her father, that the trauma had not been cured, and that T.N. was "effectively unavailable" to testify at trial. Defense counsel also argued that the defendant's right to confrontation had been violated because the state did not suggest or consider the possibility of videotaping the child in her home, the psychologist's play room, or in some other noncourtroom setting.

The trial court, in denying the motion to dismiss, ruled that the testimony of Dr. McLean as to what T.N. said during the therapy sessions was admissible hearsay. The trial court also ruled that the testimony made it patently cealr that T.N. could not have testified due to her age and the potential trauma. Based on the testimony at trial, the court stated: "I don't think the child would have been available in any sense for what we would determine to be examination or appearance in court or even by videotape or any other electronic means."

The defense then presented its case, including the testimony of two psychologists, Dr. David Nichols

and Dr. Walter McDonald. Dr. Nichols testified that at the defendant's request he interviewed T.N. on March 16, 1984. Although Dr. Nichols testified that the interview revealed very little concerning the facts of the alleged sexual assault, Dr. Nichols later testified that T.N. told him that she did not like to visit her father and that she gets white mud on her face. According to Dr. Nichols, T.N. repeatedly either denied sexual contact or stated that she did not want to talk about it. Dr. Nichols concluded that some sexual abuse had occurred and testified that he had made a recommendation to the court that there should be no further visits with the defendant.

Dr. McDonald testified that he had examined the clinical notes of Dr. McLean concerning the treatment of T.N. to determine if there was an alternative explanation for T.N.'s behavior in therapy. According to Dr. McDonald, T.N.'s increased sexual preoccupation throughout the therapy may be explained by her continual and repeated exposure to the anatomically correct dolls. Dr. McDonald further testified that his explanation was not necessarily more valid than that explanation which equally well fit the facts as they were presented to him.

On September 27, 1984, the defendant was found guilty of first-degree sexual assault. A judgment of conviction was entered, and the defendant was sentenced to five years in the Wisconsin State Prison.

Id. at 422-28, 406 N.W.2d at _____.

The state supreme court then outlined the posttrial proceedings in the trial court and in the court of appeals:

On January 28, 1985, the defendant filed postconviction motions requesting that the verdict be set aside and a new trial ordered. The motions alleged

numerous errors; including that the court erred in admitting into evidence the hearsay statements of T.N. through the testimony of Dr. McLean and Dr. Silberglitt and that the use of such evidence denied him his right of confrontation under the sixth and fourteenth amendments of the United States Constitution and Article I, sec. 7 of the Wisconsin Constitution. On March 6, 1985, the trial court heard oral argument on these motions and expressed concern that the defendant's right to confront his accuser had been violated at trial by the court's failure to make a ruling about the unavailability of T.N. No ruling was made, but another hearing was set.

In response to the trial court's comments, the state moved to supplement the record by means of an evidentiary hearing to establish that, at the time of trial, T.N. was an unavailable witness. The defendant objected to this procedure, the issue was briefed, and on April 18, 1985, the trial court granted the state's motion.

The only witness at the hearing was Dr. McLean who was called to testify by the state. He testified that T.N. would not have responded to direct questioning about the alleged sexual abuse and that such questioning could have traumatized her. In addition, Dr. McLean testified that T.N. was very fearful of her father and that the presence of her father would have a very negative effect on her. Dr. McLean agreed that a videotape could have been made of the therapy sessions, but noted that a large number of sessions would have had to be taped becasue T.N. volunteered information only gradually throughout the course of therapy. The defendant elected not to present testimony from his own psychological experts who had testified at trial. According to the defendant, the lapse of time between the trial and the hearing denied him the ability to present any meaningful evidence. The

trial court concluded that, because of the likelihood of trauma and the age of T.N., T.N. was unavailable to testify at trial.

The court of appeals, in a per curiam opinion, affirmed the judgment of the trial court. According to the court of appeals, the testimony of Dr. McLean was properly admitted under sec. 908.03(4), Stats.—statements made for the purpose of medical diagnosis or treatment. The court further concluded that T.N. was unavailable to testify and that the statements of the experts were reliable, thus satisfying the two-pronged confrontation clause analysis outlined in *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980), and *State v. Bauer*, 109 Wis. 2d 204, 210-11, 325 N.W.2d 857 (1982).

Id. at 428-29, 406 N.W.2d at _____.

In seeking review by the Wisconsin Supreme Court, Nelson raised three issues:

1. Did the trial court err in admitting the out-of-court statements of the alleged victim of two psychologists, Dr. McLean and Dr. Silberglitt?

2. If the out-of-court statements were properly admitted as exceptions to the hearsay rule, did the admittance of these statements violate the defendant's right of confrontation under the United States and Wisconsin Constitutions?

3. Did the trial court err in admitting into evidence drawings made by the alleged victim after the prosecutor in the opening statement told the jury that the drawings depicted the defendant as an erect penis?

The Wisconsin Supreme Court granted Nelson's petition for review and a divided (4-3) Court held that the out-of-court

statements were properly admissible as exceptions to the hearsay rule under section 908.03(4) of the Wisconsin Statutes—statements made for the purposes of medical diagnosis or treatment;[3] that there was no violation of the confrontation clause of the State or federal constitution; and, that the admittance into evidence of the drawings constituted harmless error. *Id.* at 422, 406 N.W.2d at _____.

II. COLLATERAL REVIEW

A. **Scope of Review**

After his state court remedies proved unavailing, Nelson filed his petition for a writ of habeas corpus in this court. The sole issue raised by his petition is whether he was denied his Sixth Amendment right to confront T.N., the alleged victim, at trial. The respondent concedes that Nelson has exhausted his state court remedies as to this issue, *see* Response to Petition for a Writ of Habeas Corpus at ¶ 3; and, based on the record of the state proceedings, the court finds that the petitioner has met his burden of demonstrating that he has met the prerequisites for relief, including fairly presenting the substance of his federal claim to the state courts. *See Picard v. Connor*, 404 U.S. 270, 275 (1971).

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[3]Section 908.03(4) of the Wisconsin Statutes provides that:

> Hearsay exceptions; availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available at a witness:
>
> . . . .
>
> (4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The ultimate determination of whether the admission of the hearsay statements violated Nelson's Sixth Amendment right to confrontation is a question of law which involves the application of legal principles to historical facts.[4] *See Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1055 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984); *United States ex rel. Scarpelli v. George*, 687 F.2d 1012, 1015 (7th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). In habeas corpus proceedings federal courts must accord a presumption of correctness to state court findings of basic, primary or historical facts and to subsidiary facts underlying ultimate conclusions, provided that the conditions of 28 U.S.C. § 2254(d)[5] are met. *See Sumner v. Mata*, 455 U.S. 591, 597 (1982); *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963);

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[4]The respondent has provided a transcript of the state proceedings which this court has reviewed and the parties have not argued that any of the historical facts are in dispute or that the petitioner did not receive a full and fair evidentiary hearing in state court, so there was no necessity for this court to hold an evidentiary hearing. *See Montgomery v. Petersen*, No. 87-2302, slip op. at 2 n.1 (7th Cir. May 4, 1988).

[5]28 U.S.C. § 2254(d) provides that:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> *(Footnote continued)*

United States ex rel. Savory v. Lane, 832 F.2d 1011, 1019 (7th Cir. 1987). This rule applies equally to findings of trial courts and appellate courts. *See Sumner v. Mata*, 449 U.S. 539, 545-47 (1981) (per curiam). It applies as well to the inferences that can be deduced from the facts. *See Marshall v. Lonberger*, 459 U.S. 422, 435 (1983). However, the legal conclusions drawn by state courts from the historical facts on the federal constitutional ques-

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(Footnote continued)

> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

tion raised are subject to independent review. *See Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980). In the same fashion, mixed questions of law and fact are subject to independent federal review. *See United States ex rel. Savory*, 832 F.2d at 1018; *Nash v. Israel*, 707 F.2d 298, 301 (7th Cir. 1983). Where the question is mixed, the federal court may give a different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard. *See Sumner v. Mata*, 455 U.S. 591, 597 (1981).

When, as here, the issue involves a federal constitutional right, federal law must be applied. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Federal habeas review can cover only violations of the Constitution, laws or treaties of the United States. *See Shillcutt v. Gagnon*, 827 F.2d 1155, 1158 (7th Cir. 1987). This court cannot entertain an argument urging that Wisconsin courts merely misconstrued state rules of evidence. *Id.*

B. **Supreme Court Treatment of the Confrontation Right**

The Sixth Amendment to the United States Constitution guarantees that in all criminal prosecutions the accused shall enjoy the right "to be confronted with the witnesses against him." This right is secured for defendants in state as well as federal criminal proceedings under *Pointer v. Texas*, 380 U.S. 400 (1965). If literally applied, the Confrontation Clause would abrogate virtually every hearsay exception, but courts have long rejected this approach as unintended and too extreme. *See, e.g., Mattox v. United States*, 156 U.S. 237, 243 (1895). Consequently, there has been a continuing struggle to define the relationship between the Confrontation Clause and the hearsay rule with its many exceptions. Because the interpretation of this relationship and the questions left unanswered by recent decisions are central to the issues raised in this case, a brief review of Confrontation Clause law is in order.

Little is known about the Framers' intent in providing the Confrontation Clause. *See, e.g.*, Read, *New Confrontation—Hearsay Dilemma*, 45 S. Cal. L. Rev. 1, 6 (1972) ("The exact

intent of the framers of the Constitution in providing [the confrontation clause] is probably undiscoverable."). However, it is generally agreed that the particular vice that gave impetus to the Confrontation Clause was the practice of trying a defendant on "evidence" which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact. *See California v. Green*, 399 U.S. 149, 156 (1970). Accordingly, in an early line of cases involving the admission of former testimony, the Supreme Court's decisions turned on whether there had been an opportunity for cross-examination prior to or during trial. *See, e.g., Mattox v. United States*, 156 U.S. 237 (1895), *Reynolds v. United States*, 98 U.S. 145 (1878).

Then, in *Barber v. Page*, 390 U.S. 719 (1968), in reversing the denial of a writ of habeas corpus for a defendant convicted of armed robbery, the Court concluded that the right to confrontation is "basically a trial right" which "includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Id.* at 725. The principal evidence against the petitioner had consisted of the reading of a transcript of the preliminary hearing testimony of a witness who, by the time of trial, was incarcerated in a federal prison in Texas. *See Id.* at 720. Even though the petitioner had had an unexercised opportunity to cross-examine the witness at the preliminary hearing, the Court held that that defendant's confrontation right had been violated by admitting this testimony because the prosecution had made no effort to produce the declarant at trial to be cross-examined and to give the jury an opportunity to weigh his demeanor. *See Id.* at 724-26. The Court explained that:

> [W]e would reach the same result on the facts of this case had petitioner's counsel actually cross-examined Woods [the incarceration witness] at the preliminary hearing. . . . A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to

> hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case.

Id. at 725-26 (footnote and citation omitted). Rejecting the state's argument that the witness' mere absence from the jurisdiction was a sufficient ground to dispense with confrontation, the Court emphasized that: "[A] witness is not 'unavailable' for the purpose of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial." *Id.* at 724-25.

In the 1970 case of *California v. Green*, 399 U.S. 149 (1970), the prosecution offered evidence of exculpatory statements that a prosecution witness made to a police officer prior to trial. *See Id.* at 151. The Court held that these hearsay statements could not be received in evidence unless the witness was able to be cross-examined regarding them at trial. *See Id.* at 164. In explaining its reasoning, the Court enumerated the underlying purposes of the Confrontation Clause, pointing out that confrontation:

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id. at 158 (footnote omitted).

Later in that same year the Court shifted the emphasis

from face-to-face confrontation to practicality and truth-finding, saying:

> The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement."

Dutton v. Evans, 400 U.S. 74, 89 (1970) (plurality) (quoting *California v. Green*, 399 U.S. 149, 161 (1970). *See also Tennessee v. Street*, 471 U.S. 409, 415 (1985). In *Dutton v. Evans*, 400 U.S. 74 (1970), a witness had testified to a brief conversation about the defendant Evans that the witness had had with a fellow prisoner in the Atlanta Penitentiary. The Court found no confrontation violation in the admission of this hearsay even though the declarant was not cross-examined and the prosecution made no showing that he was unavailable. *See Id.* at 87-89. The Court reasoned that this hearsay testimony could be admitted because it was of "peripheral significance" and was neither "crucial" to the prosecution nor "devastating" to the defendant. *Id.* at 87.

Ten years later in *Ohio v. Roberts*, 448 U.S. 56 (1980), the Supreme Court ruled that the admission of preliminary hearing testimony is constitutionally permissible only if the proponent establishes that: (1) the declarant is unavailable, and (2) the statement contains sufficient indicia of reliability to ensure accuracy in the factfinding process. *See Id.* at 65-75. Although *Roberts* dealt with prior testimony, lower courts began to apply both prongs of the *Roberts* test to all types of hearsay. For instance, in the Nelson case the Wisconsin courts used the *Roberts* test to determine whether the admission of testimony under the hearsay exception for "statements for purposes of medical diagnosis or treatment" contravened Nelson's Sixth Amendment confrontation right.

Then, in 1986, the United States Supreme Court issued its opinion in *United States v. Inadi*, 475 U.S. 387 (1986), in which it may have sharply curtailed the necessity of meeting *Roberts'*

unavailability requirement. In *Inadi*, the prosecutor offered the out-of-court declarations (taped conversations) of an unindicted co-conspirator who failed to appear at trial—allegedly due to car trouble. *Id.* at 390. The trial court admitted the statements under Federal Rule of Evidence 801(d)(2)(E). In affirming this ruling (and reversing the Third Circuit), the Supreme Court declined to require a showing of a declarant's unavailability as a prerequisite to the admission of co-conspirator statements. *Id.* at 400. Cautioning that "*Roberts* should not be read as an abstract answer to questions not presented in that case," *Id.* at 392, the Court explained that:

> *Roberts* must be read consistently with the question it answered, the authority it cited, and its own facts. . . . *Roberts* simply reaffirmed a longstanding rule. . . . that applies unavailability analysis to prior testimony. . . . *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.

Id. at 394. The Court explained that, in some situations, the truth-determining function of the Confrontation Clause can sometimes be better served without a personal examination of a declarant in front of the jury. The Court believed that, because co-conspirator statements "are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated even if the declarant testifies to the same matter in court." *Id.* at 395. By limiting *Roberts* to cases involving prior testimony sought to be admitted under Federal Rule of Evidence 804 (or an equivalent state evidentiary rule),[6] the Court implied that a showing that a witness is unavailable is not required by the Confrontation Clause for admitting any hearsay other than prior testimony. A defendant would have to look to the law of evidence to find a requirement that a non-

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[6]In *Roberts*, the prior testimony was admitted by the state trial court pursuant to section 2945.49 of the Ohio Revised Code Annotated. This statute is equivalent to Federal Rule of Evidence 804(b)(1).

testifying declarant be found unavailable. Evidence law already demands that Rule 804 declarants be unavailable before hearsay is admitted, but Rule 803 allows the admission of hearsay whether or not the declarant is available.[7]

The language of the *Inadi* opinion cast doubt on the general application of the Roberts unavailability prong to hearsay other than prior testimony. *See Inadi*, 475 U.S. at 394. Subsequently, however, in *Lee v. Illinois*, 476 U.S. 530 (1986), the Court held that a co-defendant's hearsay confession inculpating a defendant was inadmissible under the Confrontation Clause because it was unreliable. Before analyzing the reliability of the co-defendant's confession, both the majority and the dissent in *Lee* assumed that the unavailability prong of *Roberts* had to be satisfied. *Id.* at 539 & 549 n.2 (Blackmun, J., dissenting). The four dissenting justices recommended that the necessity for an unavailability finding should be determined on a case-by-case or rule-by-rule basis.[8]

In the wake of the uncertainty left by the *Inadi* decision

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[7]The co-conspirator statements at issue in *Inadi* did not fall under either Rule 803 or 804. They were admitted pursuant to Rule 801(d)(2)(E) and, as such, are defined as "not hearsay." Nevertheless, some circuits had held that, under *Roberts*, unavailability of the declarant had to be shown. *See, e.g., United States v. Inadi*, 748 F.2d 812, 819 (3d Cir. 1984), *rev'd*, 475 U.S. 387 (1986). Other circuits had ruled that compliance with Rule 801(d)(2)(E) automatically satisfies the Confrontation Clause. *See e.g., United States v. Molt*, 772 F.2d 366, 368 (7th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986). This split in the circuits was resolved by *Inadi*.

[8]Justice Blackmun, writing for the four dissenting justices, noted that:

> As this Court recently explained in *United States v. Inadi*, [475 U.S. 387 (1986)], a specific showing of unavailability is not always required. I nonetheless assume, for purposes of discussion, that in relevant respects Thomas' custodial confession is more like the prior judicial testimony at issue in *Roberts* than like the contemporaneous co-conspirator statements involved in *Inadi*, and thus both *Roberts* requirements had to be satisfied.

Lee v. Illinois, 476 U.S. 530, 549 n.2 (Blackmun, J., dissenting).

and the lack of further interpretation in subsequent Supreme Court cases, the other federal courts have not rushed to jettison the unavailability requirement. Some courts have managed to avoid the issue by finding other grounds for making a confrontation decision. *See, e.g., United States v. Vretta*, 790 F.2d 651 (7th Cir.) (impact of *Inadi* need not be decided because the declarant of the hearsay detailing prior threats was the deceased victim and was obviously unavailable)[9], *cert. denied*, 107 S. Ct. 179 (1986). Other courts have proceeded to rule on availability—just in case the requirement still applies. *See, e.g., United States v. Bernard S.*, 795 F.2d 749 (9th Cir. 1986).

Courts have been willing to dispense with the unavailability requirement or to rule that the lack of an unavailability finding is harmless error in cases where: (1) the hearsay is offered under a business record exception; or (2) the hearsay testimony is neither crucial to the prosecution nor devastating to the defendant; or (3) any utility in confronting the declarant would be remote. *See, e.g., Bernard S.*, 795 F.2d at 756 (assuming that the unavailability analysis of *Roberts* applies, the admission of medical records without a finding that the doctor who entered the information on the records was unavailable was harmless because the evidence was of peripheral significance to the case).[10]

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[9]*See also United States v. Wilmer*, 799 F.2d 495, 501 (9th Cir. 1986) ("We need not decide whether unavailability must be shown before evidence is admissible under the public records exception to the hearsay rule because confrontation clause violations are subject to harmless error analysis."), *cert. denied*, 107 S. Ct. 1626 (1987).

[10]*See also United States v. Keplinger*, 776 F.2d 678, 696 (7th Cir. 1985), *cert. denied*, 476 U.S. 1183 (1986). In *Keplinger* (a pre-*Inadi* decision), the Seventh Circuit ruled that the admission of a memorandum under the business records exception to the hearsay rule did not violate the Confrontation Clause. The court reasoned that: "Even though the government did not demonstrate the unavailability of the hearsay declarant, Gerald Kennedy, admission of the memo did not violate the confrontation clause if it was not 'crucial' to the government or 'devastating' to the defense, and if the utility of cross-examination was remote." *Id.* at 696, quoting *Dutton v. Evans*, 400 U.S. 74, 87 (1970) (plurality).

At least one appellate court has adopted the *Inadi* Court's suggestion that a defendant can obviate a confrontation problem by exercising his rights under the Compulsory Process Clause to call an absent declarant as his own witness. *See Inadi*, 475 U.S. at 397. In *Reardon v. Manson*, 806 F.2d 39 (2d Cir. 1986), *cert. denied sub nom. Reardon v. Lopes*, 107 S. Ct. 1903 (1987), the Court admitted a toxicologist's expert testimony concerning laboratory tests without requiring a showing that the assistant chemists who helped perform the tests were unavailable. The court reasoned that:

> [A]t least in those borderline cases where the likely utility of producing the witness is remote, the Sixth Amendment's guarantee of an opportunity for effective cross-examination is satisfied where the defendant himself had the opportunity to call the declarant as a witness.

Id. at 42.

C. **Nelson's Confrontation Right**

This uncertainty over the continuing viability of the *Roberts* test impacts on Nelson's petition for habeas corpus, because the central issue the petitioner raises is whether his confrontation rights were violated by the admission of the out-of-court statements of the alleged victim, T.N., who did not testify at trial. As explained above, the state courts used both prongs of the *Roberts* test to assess whether admitting T.N.'s statements under a hearsay exception violated Nelson's Sixth Amendment Rights.[11] *See State v. Nelson*, No. 85-1125-CR, slip op. at 3 (Wis. Ct. App. April 23, 1986), *aff'd*, 138 Wis. 2d 418, 437-46, 406 N.W. 2d 385, _____ (1987).

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[11]Even though the *Inadi* decision was issued before the Wisconsin Supreme Court issued its ruling in the *Nelson* case, the *Inadi* case was not discussed in that court's opinion.

1. **Hearsay Exception**

When faced with an objection to the admission of out-of-court statements, a court's first task is to determine whether the statements are hearsay and, if so, whether they are nevertheless admissible as an exception to the rule against hearsay. At Nelson's trial the state called as its witness Dr. Donald McLean, a clinical psychologist who was qualified by the court as an expert in the field of psychology. *See* Brief of Respondent at Appendix R.20, p. 12. Aware that Dr. McLean would attempt to testify to statements made to him by T.N., Nelson's counsel interposed hearsay and confrontation objections. *Id.* at pp. 14-15. The court overruled the objections and admitted T.N.'s statements to Dr. McLean under section 907.03 of the Wisconsin Statutes, which provides that:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Wis. Stat. § 907.03. The Wisconsin Court of Appeals agreed with the result, but not the basis for this ruling. *See State v. Nelson*, No. 85-1125-CR, slip op. at 2-3 (Wis. Ct. App. April 23, 1986), *aff'd*, 138 Wis. 2d 418, 406 N.W.2d 385 (1987). The appellate court held that the hearsay statements could more properly have been admitted under section 908.03(4) of the Wisconsin Statutes, which provides that:

> The following [is] not excluded by this hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements made for

> purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Wis. Stat. § 908.03(4).

The Wisconsin Supreme Court affirmed that the hearsay testimony of Dr. McLean was admissible under the section 908.93(4) exception. *See State v. Nelson*, 138 Wis. 2d 418, 431-35, 406 N.W.2d 385, _____ (1987). In arriving at this conclusion the court considered a number of factors:

> In the present case a number of factors support a finding that T.N. was aware that her statements were being used as a basis for medical diagnosis or treatment. T.N.'s sessions with Dr. McLean, although mainly conducted in a play therapy room, were scheduled and conducted in a manner consistent with the provision of diagnosis and treatment. Dr. McLean had a waiting room in which T.N. and her mother would await their regularly scheduled appointments. T.N. was aware that she saw Dr. McLean on an appointment basis and that he was not her peer. Very early in the treatment, Dr. McLean made it clear to T.N. that he was an authority figure, not a playmate. T.N. began her treatment with Dr. McLean by undergoing a series of tests and evaluations. Although most of the sessions were conducted in a play therapy room, T.N. would occasionally sit and speak with Dr. McLean in his formal office. T.N. was described as a very intelligent child. We conclude that T.N. was aware that she was being observed, with a goal towards treatment.
>
> Furthermore, there is nothing in the record to indicate that T.N.'s motive in making the statements to Dr. McLean and Dr. Silberglitt was other than as a patient seeking treatment. It is always difficult for a

> court to determine whether a very young child completely understands the context in which information is sought from that child. However, we do not believe that, because a child is only three or four years of age at the time he or she goes to a doctor, the child is unable to comprehend that the child is involved in the process of receiving diagnosis or treatment. A child is no less aware of the existence of emotional or mental pain than physical pain and thus, is equally aware of the necessity and beneficial nature of therapy.

Id. at 431-32, 406 N.W.2d at _____. Although the court recognized that the child was merely four years of age, it concluded "that such a child also understands that statements made to a psychologist will be used by the psychologist to ease the emotional or psychological injuries of the child." *Id.* at 432, 406 N.W.2d at _____. Finally, the court held that, while the general rule is that statements as to who was at fault are ordinarily inadmissible under the exception for statements made for purposes of diagnosis or treatment, the treatment of a child abuse victim often depends upon uncovering the identity of the abuser and separating the assailant from the victim.[12] Based on this

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[12]In general, statements of fault are not included under the hearsay exception for statements for the purpose of medical diagnosis or treatment. *See United States v. Pollard*, 790 F.2d 1309, 1313-14 (7th Cir. 1986), *overruled on other grounds, United States v. Sblendorio*, 830 F.2d 1382 (7th Cir. 1987). However, in cases of child abuse, some courts have made an exception when the alleged abuser is a member of the victim's household on the theory that identification of the perpetrator is relevant to the treatment and to the prevention of recurrence of the injury. *See United States v. Renville*, 779 F.2d 430, 435-39 (8th Cir. 1985) ("We believe that a statement by a child abuse victim that the abuser is a member of the victim's immediate household presents a sufficiently different case from that envisaged by the drafters of Rule 803(4) that it should not fall under the general rule. Statements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household *are* reasonably pertinent to treatment."). When the alleged abuser is not a member of the victim's household, the exception is not made. *See United States v. Iron Shell*, 633 F.2d 77, 83-85 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *United States v. Nick*, 604 F.2d

(Footnote Continued)

reasoning, the court concluded "that T.N.'s identification of the defendant as the assailant was a necessary element for those charged with determining appropriate diagnosis or treatment. Accordingly we hold that Dr. McLean's testimony as to the hearsay statements made by T.N. was properly admitted into evidence." *Id.* at 434, 406 N.W.2d at _____.

This evidentiary ruling would be reviewable by this court only for an abuse of discretion which resulted in a denial of the fundamental fairness of the trial proceedings guaranteed by the Due Process Clause of the Fourteenth Amendment. *See Woodruff v. Lane*, 818 F.2d 1369, 1373 (7th Cir. 1987); *Drees v. Campoy*, 784 F.2d 996, 998 (9th Cir. 1986). The petitioner has raised no due process challenge in his habeas corpus action, so this court need only review the question of whether admitting T.N.'s statements violated constitutional Confrontation Clause standards.

2. **Unavailability**

At trial, when Nelson's counsel made a Confrontation Clause objection to admitting T.N.'s statements through Dr. McLean's testimony, the prosecution made no contemporaneous attempt to show that T.N. was unavailable, nor did the trial judge immediately address the constitutional objection. When the objection was renewed in connection with the defendant's motion to dismiss at the close of the state's case, the court found that the child was not "available in any sense for what we would determine to be examination or appearance in court or even by videotape or any other electronic means." Brief of Respondent at Appendix R.21, p. 28. Ruling that the testimony was relevant, properly admitted and not unfairly prejudicial, the court denied the motion. *Id.* at p. 29.

(Footnote Continued)

1199, 1201-02 (9th Cir. 1979). The instant case falls somewhere between the general rule and the exception. At the time of the alleged incidents Brian Nelson was not a member of T.N.'s household, although he periodically took her to his own home for overnight visits.

In his postconviction motions the defendant again raised the confrontation issue. The court, dissatisfied with its midtrial ruling because Nelson had not been given an opportunity to rebut the state's evidence that T.N. was unavailable, scheduled a hearing on the confrontation issue. Despite the defendant's objection that conducting an unavailability hearing some eight months after trial was not "meaningful," the court proceeded to hear the testimony of the sole witness, Dr. McLean. At the conclusion of this hearing, the court, emphasizing that the child was merely four years old, ruled that:

> I don't think that, and as the doctor's [sic] testified to, I don't believe that there could ever have been in any way any meaningful testimony appropriated from the stand. In fact, I think it's quite obvious that she chose not to say anything. Therefore, I do find both, on those basis—First, I don't believe that she would have testified. She's unavailable on that basis. Secondly, that the trauma that it would cause her. I don't think we're in the midst of trying cases, [to inflict] injury on victims of crimes especially victims who are three or four years old. Then they'd have to compound the injurys that's already been done to them by the action compounded by making them come into court and testify. I do declare that the child was unavailable.

Brief of Respondent at Appendix R.26, p. 27-28.

The Wisconsin Court of Appeals was satisfied that the trial court had properly found that T.N. was unavailable to testify at trial. *See State v. Nelson*, No. 85-1125-CR, slip op. at 4 (Wis. Ct. App. April 23, 1986), *aff'd*, 138 Wis.2d 418, 406 N.W.2d 385 (1987). The court reasoned that the postconviction hearing offered a meaningful opportunity to challenge the historical fact of T.N.'s unavailability and that, even if a new trial were granted, the evidence would be substantially the same, given the fact that no witness testified for the defendant that T.N. was available. The court then ruled that there was sufficient evidence in the

record showing that T.N. would have been "traumatized," if required to testify and that she could have "given no meaningful testimony." *Id.* at 6-7.

Wisconsin's Supreme Court affirmed the unavailability ruling on similar grounds. The majority of the court concluded that the posttrial unavailability hearing was both adequate and meaningful, reasoning that:

> We agree with the defendant's contention that the trial court's ruling on his motion to dismiss at the close of the state's evidence did not satisfy the confrontation clause. It is clear that defendants must be given the opportunity to rebut the prosecution's argument that a party is unavailable. However, we conclude that the retrospective inquiry at the post-conviction hearing adequately accommodated the defendant's right to rebut the state's position.

Id. at 436 n.6, 406 N.W.2d at _____.[13] The court noted that only one witness—Dr. McLean—was called to testify on the unavailability issue, even though the defendant could have called his own witnesses. The court then ruled that: "The likelihood that any questioning of T.N. would cause severe trauma, as well as the uncertain efficacy of such questioning, leads us to conclude that T.N. was unavailable to testify at trial." *Id.* at 443, 406 N.W.2d at _____.

This court does not agree that the evidence in the record supports the conclusion that T.N. was unavailable to testify at trial. Without the benefit of any in-court or out-of-court observation of T.N. by the court or the jury, the Wisconsin courts merely noted that she was four years old and that she had been seen by a psychologist. Based on these facts and the opinions elicited from the psychologist, they then deduced that requiring her to

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[13] *See also State v. Linder*, 142 Wis.2d 783, 792, _____ N.W.2d _____ (Ct. App. 1987) (allowing a postconviction unavailability hearing).

testify would lead to further trauma and that, in any case, her testimony would be of little value.

As explained above, the United States Supreme Court has decreed that: [A] witness is not 'unavailable for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain [her] presence at trial.'' *Barber v. Page*, 390 U.S. 719, 724-25 (1968). There is nothing in the *Nelson* record to show that the state made any effort, good faith or otherwise, to obtain the presence of T.N. at trial. When a Confrontation Clause objection is made, it should alert the state to the need for presenting proof of the declarant's unavailability. *See United States v. Dorian*, 803 F.2d 1439, 1448 (8th Cir. 1986) (Bright, Senior J., dissenting). Before calling Dr. McLean to the stand, the state made no effort to establish unavailability, but when the defendant's Confrontation Clause objection was renewed at the close of the state's case, the state merely pointed to T.N.'s age and to the testimony of Dr. McLean and another psychologist, Dr. Silberglitt, and argued that:

> Anyway, in the course of the 59 sessions that Doctor McLean has testified to, this child is undergoing tremendous trauma as a result of what happened between herself and her father. To this day she is still under the trauma. It has not been successfully cured, so to speak. There would have been no possibility, and I think this record makes it clear that that witness is effectively unavailable, not only because of her age, but because of the trauma that was induced and the trauma that obviously would result by making her face the defendant and testify. Furthermore, the doctors have testified to their evaluations. They are expert psychologists. They are both psychologists who are expert in the field of children, and therapy and examinations of children and evaluations of children. Certainly they can express their opinion as to what the child is getting across and statements that the child has made. I don't think that in any way invades the province of the jury. That's what experts are for, to

> render opinions, and I don't think that this case law prohibits what these psychiatrists have testified to.

Brief of Respondent at Appendix R 21, p. 26-27. These arguments suggest that T.N. might not have been an effective witness, but it does not show that any effort was made by the state to produce T.N. Age is an aspect of competency rather than availability. *See, e.g., Kentucky v. Stincer,* 107 S. Ct. 2658, 2660 (1987). However, under Wisconsin law every person is presumed to be competent to be a witness except as provided by sections 885.16 ("transactions with deceased or insane persons") and 885.17 ("transactions with deceased agent") of the Wisconsin Statutes. *See* Wis. Stat. § 906.01.[14] Wisconsin judges are not empowered to review a witness' competency. This is a matter of credibility to be dealt with by the trier of fact. *See State v. Dwyer,* No. 87-1031-CR, slip op. at 11 (Wis. Ct. App. February 9, 1988).

Wisconsin courts use the criteria set forth in section 908.04 of the Wisconsin Statutes to determine whether a witness is unavailable for confrontation purposes when any exception to the hearsay rule is at issue. *See, e.g., Dwyer,* No. 87-1031-CR, slip op. at 11-13 (hearsay ruled admissible under section 908.03(2) as an excited utterance). Section 908.04 states, in relevant part, that:

> (1) "Unavailability as a witness" includes situations in which the declarant:
>
> (a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement; or
>
> (b) Persists in refusing to testify concerning the

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[14]Section 906.01 of the Wisconsin Statutes provides that:

> Every person is competent to be a witness except as provided by ss. 885.16 and 885.17 or as otherwise provided in these rules.

subject matter of his statement despite an order of the judge to do so; or

(c) Testifies to a lack of memory of the subject matter of his statement; or

(d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(e) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

Wis. Stat. § 908.04(1). Only that part of subsection (d) which speaks of "then existing . . . mental illness or infirmity" is relevant to this situation. Dr. McLean testified that, at the time of trial, he was treating T.N. for what he perceived to be mental and emotional trauma; however, he never precisely defined the extent of this "trauma." This court assumes that any victim of crime, particularly child abuse, would suffer trauma which would persist for a period of time and that testifying in court would be upsetting. Nevertheless, courts have not carved out a general exemption from testifying for victims of child abuse. *See, e.g., United States v. Frazier*, 678 F. Supp. 499, 502 (E.D. Pa. 1986) (three-year-old victim of sexual assault testified at trial).

In *Burns v. Clusen*, 798 F.2d 931 (7th Cir. 1986), a habeas corpus action following a conviction for sexual assault, the victim's treating physician testified that, based on an examination conducted two months earlier, he had diagnosed the victim, L.L., to have a "schizophreniform disorder" and was of the opinion that if L.L. was forced to testify at trial there was a "high probability that it would cause anywhere from a moderate to substantial relapse and return of symptoms." *Id.* at 935. Even though the defense did not offer expert testimony to counter the doctor's testimony, the court found that the state court's factual findings were not supported by the record, in part, because the state's evidence was stale. The appellate court held that: "the

state has not fulfilled its burden of proving L.L.'s unavailability as a precendent to offering her prior testimony. The prosecution has neither made stringent efforts to show that L.L. was unavailable, nor produced affirmative proof of L.L.'s actual unavailability at the time of trial in March 1981." *Id.* at 942. In arriving at this conclusion the court reasoned that:

> A witness cannot be declared "unavailable" simply because the prosecutor or circuit court concludes that the witness might not want to testify. The witness must "persist in refusing to testify concerning the subject matter of [her] statement despite an order of the judge to do so." Wis. Stats. § 908.045(1) (1982). When another individual's liberty is at stake, the decision to allow a witness to be exempt from the public duty to testify must be made by the trial court, not the witness or the state. *State v. Burns*, 112 Wis. 2d 131, 163, 332 N.W.2d 757 (1983) (Abrahamson, J., dissenting).
>
> A declaration that a witness is "unavailable" because of mental disability cannot be a "back-door" acknowledgement that a witness is simply reluctant or likely to refuse to testify. Rather, the prosecution has the burden to prove that the witness has a "then-existing mental illness." It is true in this case that the defense counsel did not take advantage of numerous opportunities to force the State to meet its burden or to aid the court in clearing away confusion. Nevertheless, the burden is not on petitioner to prove that L.L. was available. The burden is on the State, and if it fails to meet that burden, the judge must either find the witness available, or require the State to bring before the court updated information which it requires to make a determination.

Burns, 798 F.2d at 942-43 (footnote omitted).

The court of appeals emphasized that:

> The burden of proving the unavailability of the witness rests upon the party offering the prior testimony. If there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. *Ohio v. Roberts*, 448 U.S. at 74, 100 S. Ct. at 2543. The lengths to which the prosecution must go to produce a witness is a question of reasonableness. *California v. Green*, 399 U.S. 149, 189, n.22. 90 S. Ct. 1930, 1951 n.22, 26 L.Ed.2d 489 (1970).

Id. at 937.

The court then outlined the governing criteria:

> In a situation where the State argues that a witness is unavailable because of mental illness, the judge must consider both the duration and the severity of the illness. With regard to duration, it is not essential to a finding of unavailability that the illness be permanent. The duration of the illness need only be in probability long enough so that, with proper regard to the importance of the testimony, the trial cannot be postponed, *United States v. Amaya*, 533 F.2d 188, 191 (5th Cir. 1976), citing 5 Wigmore, *Evidence* § 1406(a) (Chadbourn rev. 1974). In the case of a mental rather than a physical disability, the trial judge's task is more difficult because there is often greater uncertainty as to the prognosis. *Parrott v. Wilson*, 707 F.2d 1262 (11th Cir.), *cert. denied*, 464 U.S. 936, 104 S. Ct. 344, 78 L.Ed.2d 311 (1983). A judge must weigh the desirability of a speedy trial against the possibility that a further delay may find the declarant competent.
>
> As to severity, mental illness itself may not automatically render a witness unavailable. The judge must consider the symptoms, what tasks a witness is then capable of. While all victims of violent crimes

> may suffer emotional trauma, some victims may suffer far greater anguish than normally accompanies court appearances. *See, e.g., Warren v. United States*, 436 A.2d 821, 828-29 (D.C. App. 1981) (two psychiatrists independently conclude that if a rape victim were forced to testify, the probability of severely incapacitating psychological injury was high because her depression had reached suicidal levels.

Id. at 937-38.

This court cannot find any testimony by Dr. McLean or any of the other experts stating how long they expected T.N.'s trauma to persist. The state never asked this question. However, it is interesting to note that at the postconviction hearing in May of 1985, Dr. McLean testified that he had concluded his treatment of T.N. in February—approximately four-and-one-half months after trial. *See* Brief of Respondent at Appendix R. 26, p. 5. Therefore, it appears T.N.'s trauma was neither permanent nor of long duration.

As for severity, Dr. McLean testified that T.N. was not psychotic. *See Id.* at Appendix R.20, p. 27. And there was no testimony that she would be rendered suicidal or harmful to herself by appearing for trial. The only negative effect which Dr. McLean predicted was a possible regression. *See Id.* at Appendix R.26, p. 23. However, he also admitted that she had regressed or experienced trauma at various times during therapy, so it cannot be supposed that regression is an irreparable phenomenon to be avoided at all costs.

As in *Burns*, the state courts' rulings of unavailability in this case are not fairly supported by the record. The evidence does not show that T.N.'s mental "trauma" was of sufficient duration or severity to warrant excusing her from testifying at trial, as scheduled, or after a reasonable period of delay to allow for the completion of her therapy. Therefore, the court concludes that the unavailability prong of the *Roberts* test has not been satisfied.

This conclusion does not necessarily lead to the ultimate conclusion that Nelson is entitled to the issuance of a writ of habeas corpus. As explained above, under the *Inadi* decision, meeting the unavailability prong of the *Roberts* test may no longer be required when hearsay other than former testimony is admitted.

If the Confrontation Clause offers no more protection to the defendant than the rules of evidence provide, then the availability of the declarant is immaterial to the admissibility of a statement made for the purpose of medical diagnosis or treatment. However, the parties have not cited, and this court has not found, any post-*Inadi* decision in which a court has ruled that, under the Constitution, admitting hearsay statements under the Federal Rule of Evidence 803(4), or a state equivalent, without making a finding that the declarant is unavailable, does not offend the Confrontation Clause. While statements made for medical purposes are not made under circumstances resembling former testimony or the other Rule 804 hearsay exceptions which require a finding of unavailability,[15] they are not generally

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[15] The exceptions contained in Federal Rule of Evidence 804 include: (1) former testimony; (2) statement under belief of impending death; (3) statement against interest; (4) statement of personal or family history; and (5) a residual exception which excepts:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(Footnote Continued)

considered equal in reliability to the records and statements excepted in subscriptions (5) through (23) of Federal Rule of Evidence 803.[16] One commentator has explained that:

> It may be that the Court [in *Roberts*] intended to impose a general unavailability requirement upon statements offered in criminal trials under the first four exceptions to the rule against hearsay.[17] . . . It has been contended that these four exceptions have lesser reliability than some of the other exceptions. . . . In fact, during the drafting process, it was urged that they be included as a part of Fed. R. Evid. 804, which requires its own showing of unavailability.

Kirkpatric, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 Minnesota Law Review 665, 690-91 n.132 (1986) (citations omitted).

Despite the uncertainty left by *Inadi*, the court believes that, under the facts of this case, T.N.'s statements to Dr. McLean

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(Footnote Continued)

[16]Subsections (5) through (23) of Federal Rule of Evidence 803 except the following from hearsay, whether or not the declarant is available: (5) recorded recollection; (6) records of regularly conducted activity; (7) absence of entry in records kept in accordance with the provisions of paragraph (6); (8) public records and reports; (9) records of vital statistics; (10) absence of public record or entry; (11) records of religious organizations; (12) marriage, baptismal, and similar certificates; (13) family records; (14) records of documents affecting an interest in property; (15) statements in documents affecting an interest in property; (16) statements in ancient documents; (17) market reports, commercial publications; (18) learned treastises; (19) reputation concerning personal or family history; (20) reputation concerning boundaries or general history; (21) reputation as to character; (22) judgment of previous conviction; (23) judgement as to personal, family or general history, or boundaries.

[17]The first four exceptions, found in Federal Rule of Evidence 803, are: (1) present sense impression; (2) excited utterance; (3) then existing mental, emotional, or physical condition; (4) statements for purposes of medical diagnosis or treatment.

should not have been admitted unless T.N. was unavailable to testify at trial. A finding of unavailability is clearly required under the "peripheral significance" test set forth in *Dutton v. Evans*, 400 U.S. 74 (1980) (plurality), because T.N.'s statements were both "crucial" to the prosecution and "devastating" to the defense. *See Id.* at 87-89. *See also Pickett v. Bowen*, 798 F.2d 1385, 1387 (11th Cir. 1986). The statements comprised the most significant substantive evidence on the essential elements of cause and fault. Furthermore, the state courts' assumption that T.N.'s testimony would have been of "small utility to the defendant," *see State v. Nelson*, 138 Wis. 2d 418, 438, 406 N.W.2d 385 (1987), was unwarranted. Although Dr. McLean expressed doubt that T.N. would verbally respond to an in-court examination, at the very least her appearance would have given the jury an opportunity to observe her demeanor.

The suggestion in *Inadi* that a defendant who foresees some utility in cross-examining a witness should invoke the Compulsory Process Clause of the Sixth Amendment to call the declarant as his own witness is not applicable in this case where the declarant is the alleged victim. The Compulsory Process Clause only speaks of the defendant's right "to have compulsory process for obtaining witnesses *in his favor*." U.S. Const. amend VI (emphasis supplied).

As explained above, this court has concluded that T.N. was not "unavailable" to testify in the constitutional sense. Whether or not this finding is required, the fact remains that T.N. did not testify and the petitioner was never afforded an opportunity for cross-examination. Therefore, under the still-viable second prong of the *Roberts* test, the court must determine whether these statements bear sufficient indicia of reliability "to overcome the weighty presumption against the admission of such uncross-examined evidence." *Lee v. Illinois*, 476 U.S. 530, 546 (1986).

3. **Indicia of Reliability**

In *Roberts*, the Supreme Court said that the reliability of a

hearsay statement "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The trial court in *Nelson* did not evaluate the reliability of T.N.'s statements to Dr. McLean as hearsay. Instead, the court evaluated the statements as bases for Dr. McLean's expert testimony, despite the fact that Dr. McLean did not offer an ultimate opinion based on these statements. The court reasoned that the statements were properly admissible under section 908.03 of the Wisconsin Statutes because the bases for the expert testimony were disclosed to the defendant prior to trial, thereby giving the jury an adequate opportunity to assess the weight and credibility to be accorded the testimony. *See* Brief of Respondent at Appendix R.21, p. 29.

Because Dr. McLean did not render an expert opinion, the Wisconsin Court of Appeals ruled that T.N.'s hearsay statements were properly admitted as "statements made for purposes of medical diagnosis or treatment." *See* Wis. Stat. § 908.03(4). Then, without citing any substantiating evidence, the court abuptly concluded that the testimony had "sufficient guarantees of trustworthiness." *State v. Nelson*, No. 85-1125-CR, slip op. at 6 (Wis. Ct. App. April 23, 1986), *aff'd*, 138 Wis. 2d 418, 406 N.W.2d 385 (1987).

In affirming this ruling, the Wisconsin Supreme Court pointed out that T.N.'s statements to Dr. McLean fit "within a firmly rooted hearsay exception" (section 908.03(4) of the Wisconsin Statutes[18]). *State v. Nelson*, 138 Wis. 2d 418, 444, 406 N.W.2d 385, _____ (1987). Nevertheless, the court recognized that "the existence of unusual circumstances may warrant exclusion of the evidence even if it falls within a firmly rooted hearsay exception." *Id.* at 444, 406 N.W.2d at _____. Therefore, because the court believed that the application of section 908.03(4) to a "psychologist-patient situation in which the patient

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[18]*See* Part II(C)(1), above.

is between three and four years of age, may in and of itself, constitute unusual circumstances," the court went on to identify what it considered to be particularized guarantees of trustworthiness.

1. the cross-examination of Dr. McLean, his methodology, and his conclusions, in conjunction with the availability of his entire set of notes from the treatment sessions combined to assure that the jury had a satisfactory basis for evaluating the truthfulness of the admitted evidence;

2. the age of the declarant, T.N.:

3. the nature of the allegations of sexual abuse based on the theories that: (a) it is highly unlikely that children persist in lying to their parents or other figures of authority about sex abuse; and (b) children do not have enough knowledge about sexual matters to lie about them.

See Id. at 444-46, 406 N.W.2d at _____. Based on these factors, the Supreme Court concluded that the hearsay statements "meet the standards for reliability set forth in prior confrontation clause cases." *Id.* at 444, 406 N.W.2d at _____.

The three dissenting justices would have reversed the conviction and ordered a new trial on the grounds that the statements of the child did not fit within the section 908.03(4) hearsay exception and did not have sufficient indicia of reliability.[19]

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[19]The dissent also believed that the child could have testified via videotape or some other nonconventional means, but that the child should not have been excused altogether from testifying. Nelson's trial was held before the effective date of the Wisconsin statute permitting videotaped depositions of child witnesses to be admitted into evidence. *See* Wis. Stat. § 967.04(7)-(10). Wisconsin courts have held that the use of such a deposition without a showing that the witness is unavailable violates the Sixth Amendment. *See State v. Linder*, 142 Wis. 2d 783, 790, _____ N.W.2d _____ (Ct. App. 1987).

See Id. at 447-50, 406 N.W.2d at _____. The dissenters pointed out that the exception for statements for purposes of medical diagnosis or treatment assumes that such statements "are reliable because 'the patient knows that the kind of treatment he receives, and its value and helpfulness, may largely depend on the accuracy of the information which he gives to the doctor.' " *Id.* at 447-48, 406 N.W.2d at _____ (quoting McCormick, *Evidence* § 266 at 563 (1984)). The dissent then reasoned that:

> That element of reliability, despite the unsupported assertions of the majority, are absent here. The patient was three years old, there was no evidence that the child had any idea that the numerous sessions with the psychologist were for the purpose of treatment. Indeed, the record shows that the technique of eliciting information from the child was to simulate play. Thus, while there was no circumstance that would tend to cause a person, even in a *post litem motem* situation, to not tell the truth, the affirmative evidence of reliability that would be induced by a consciousness of the fact of treatment was entirely absent. The assertion that the interrogator was an authority figure is irrelevant to the rationale of the exception. There is no hearsay exception for statements made to authority figures. Unfortunately, it is the court here which gives recognition to the psychologist as an authority figure. Under this evidentiary scheme, the credence is being given not to the child, whose reliability is not enhanced by the circumstances, but to the hearsay testimony of the reporting psychologist.

Nelson, 138 Wis. 2d at 448, 406 N.W.2d at _____.

This court agrees with the Wisconsin Supreme Court's conclusion that particularized guarantees of trustworthiness were required in order to avoid a Confrontation Clause violation in this case. The *Roberts* court stated that if hearsay testimony falls within a "firmly rooted hearsay exception," reliability can be inferred. *Roberts*, 448 U.S. at 66. *See also Marshall v. Young*,

833 F.2d 709, 716 (7th Cir. 1987). The hearsay exception for statements for purposes of medical diagnosis or treatment may be a "firmly rooted" exception from the standpoint of long-time acceptance.[20] *See, e.g., Meaney v. United States*, 112 F.2d 538 (2d Cir. 1940), *Kennedy v. Upshaw*, 66 Tex. 442, 1 S.W. 308 (1886). However, because of her young age and alleged psychic trauma, T.N. is far from being the typical declarant under this exception. Her statements were not made under the typical circumstances in which a patient, hoping for a quick cessation of physical pain, realizes that the effectiveness of treatment depends upon the accuracy of the information conveyed to the physician. *See, e.g., Cook v. Hoppin*, 783 F.2d 684, 690 (7th Cir. 1986); *United States v. Narciso*, 446 F. Supp. 252, 288-89 (E.D.Mich. 1977).

Dr. McLean is not a medical doctor. He is a clinical psychologist who was recommended to T.N.'s mother when she called the courthouse to ask whether Brian Nelson's visiting rights could be curtailed. *See* Brief of Respondent at R.20, p. 49. The state courts assumed that the child realized that she was being diagnosed and treated by Dr. McLean because her sessions were scheduled on a regular basis and because she had to wait for her appointments in an anteroom. *See State v. Nelson*, 138 Wis. 2d 418, 431-32, 406 N.W.2d 385, _____ (1987). However, the record reveals that the salient feature of the facility in which Dr. McLean conducted most of his sessions with T.N. was that it was a simulated playroom, meant to put a child at ease. On direct examination, Dr. McLean offered the following description of the room:

> The play therapy room there that you wanted me to describe is, it has a long table, 6 or 8 feet long against the wall. Table is maybe three feet wide. On top of it are games and puzzles and coloring books and crayons and magic markers and puzzle cubes, that's a block in which the—you can take the pieces out and you have

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[20]The parties have not cited, and the court has not located, any case explicitly stating that the federal counterpart to section 908.03(4), Federal Rule of Evidence 803(4), is a firmly rooted hearsay exception.

to put them in, different shapes in the right slots. Tinkertoys for the floor. There's a train under the table. There are children's pictures on the walls. There are a lot more games and puzzles. There's Play Dough under the table. There's a toy typewriter, toy telephone. There is a basketball hoop on one wall. Tinkertoys, and on and on, just loaded, just—a little toy gun. Almost any, children really think the room is almost anything a child would want in a room. There is a little sink, some little girls sometimes will use the little dishes and they will be making cakes and all kinds of things.

Brief of Respondent at Appendix R.20, pp. 20-21.

There is nothing in the record to show that Dr. McLean ever explained his role to T.N. or that he attempted to explain the purpose of the sessions. In *United States v. Renville*, 779 F.2d 430, 438 (8th Cir. 1985), a child abuse case, the court explained that a child's statement to a treating physician identifying the abuser can only be considered reliable "where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding."[21] The record reveals no such dialog between Dr. McLean and T.N. in this case. Moreover, the Wisconsin courts did not explain how this particular four-year-old girl would have had any prior experience or knowledge about psychological illness or its treatment.

Under these unusual circumstances, it is not clear that T.N.'s statements fall within the usual confines of the hearsay exception for statements made for the purpose of medical

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[21]Courts have reasoned that if a declarant makes a statement while under the impression that she is being asked to indicate who was responsible for what happened, her response may very well be accusatory in nature and "any inherent reliability of such a statement is thereby destroyed." *United States v. Narciso*, 446 F. Supp. 252, 289 (E.D. Mich. 1977).

diagnosis or treatment. Therefore, reliability cannot be inferred without more.

The respondent appears to recognize that these statements do not fit within the traditional rationale of the rule and argues, in the alternative, that the statements were admissibile under the residual exception for "statements not specifically covered by any of the other exceptions but having equivalent circumstantial guarantees of trustworthiness. . . ." Wis. Stat. § 908.03(24). *See also* Federal Rule of Evidence 803(24). This argument does not lessen the state's burden because the residual exception is not a "firmly rooted" hearsay exception, so particularized guarantees of trustworthiness are still required. *See United States v. Dorian*, 803 F.2d 1439, 1447 (8th Cir. 1986).

Such guarantees are notably absent from the *Nelson* record. The state courts found that the reliability of T.N.'s statements was bolstered by the fact that Dr. McLean's notes[22] were disclosed to the defendant prior to trial, thereby giving Nelson an opportunity to challenge the doctor's methodology and conclusions by cross-examination and by the critique of another expert. *See Nelson*, 138 Wis. 2d at 444-45, 406 N.W.2d at _____. However, this reasoning confuses the criteria for evaluating the bases of an expert's opinion with the criteria for evaluating the reliability of a hearsay statement. While the cross-examination of

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[22]Dr. McLean's testimony provided the only evidence from which the jury could find that T.N. actually made the statements in question. *See United States V. Guinan*, 836 F.2d 350, 358 (7th Cir. 1988) ("statements are [constitutionally] admissible even where there was no cross-examination if it is clear (1) that the declarant actually made the statement in question; and (2) there is circumstantial evidence supporting its veracity"). Dr. McLean testified that he sometimes jotted down T.N.'s statements verbatim during the sessions. *See* Brief of Respondent at Appendix R.20, p. 29. Other notes contained his interpretation of T.N.'s nonverbal acts performed during "play therapy," a process Dr. McLean described as "a little bit like interpreting a dream in an adult." *Id.* at Appendix R.20, p. 20. These notes were disclosed to the defendant prior to trial, but were not offered into evidence at trial. *See* Brief of Respondent at 27. Dr. McLean also testified that he had taperecorded some of the sessions, but that he had destroyed the taperecordings prior to trial. *See Id.* at Appendix R.20, p. 83.

Dr. McLean might have given the jury a basis for evaluating the weight and probative value of his own testimony, it did not give the jury a reliable basis for evaluating the demeanor and credibility of T.N. herself.

Whenever the proffered testimony of an absent witness "provides 'direct evidence of guilt,' the court imposes a stringent presumption against admission of such evidence and recognizes a need for careful case-by-case analysis." *United States v. Vigoa*, 656 F. Supp. 1499, 1511 (D.N.J. 1987). In this case, T.N.'s statements comprised the only direct evidence on all the essential elements of the first degree sexual assault charge. The only corroborating evidence was the opinions of the experts Drs. McLean, Silberglitt and Nichols, each of whom believed that T.N. had had some sort of inappropriate sexual experience. Although these experts testified that T.N. had made the statements at issue, the truth of the matter asserted was not substantially corroborated by any other independent evidence. *Cf. United States ex rel. Bell v. Director, Department of Corrections*, No. 86-2772, slip op. at 7 (7th Cir. May 20, 1988). There was no physical evidence, no eyewitness, and no testimony that T.N. immediately reported any incident to anyone with whom she had a relationship of trust. Dr. McLean was not a person to whom T.N. naturally would have reported the incidents in question and her statements to him were made months after T.N.'s last visit with her father.[23]

A growing body of state legislation and decisional law, as well as commentary, recognizes the need for receiving the declarations of child victims as to abusive events and for accepting the reliability of children as to such evidence. *See, e.g., United States v. Cree*, 778 F.2d 474, 478 (8th Cir. 1985); *United States v. Frazier*, 678 F. Supp. 499, 504 (E.D. Pa. 1986); *State v. Nelson*,

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[23]Some commentators are of the opinion that the passage of a considerable period of time between the alleged incident and the victim's statements provides an opportunity for improper influence on the part of a third person. *See* Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 Minnesota Law Review 523, 532 n.39 (1988).

138 Wis. 2d 418, 406 N.W.2d 385, _____ (1987); Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 Minnesota Law Review 523 (1988). Federal courts have been willing to construe the statutory exceptions to the rule against hearsay broadly to permit out-of-court statements of alleged victims of child abuse to be admitted into evidence as excited utterances, or as statements for purposes of medical treatment or diagnosis, or as residual exceptions. However, such rulings are most often made in situations where the declarant also testified at trial or, at least, where the prosecution made an effort to produce the witness. *See United States v. Shaw*, 824 F.2d 601 (8th Cir. 1987) (eleven-year-old victim testified at trial); *United States v. DeNoyer*, 811 F.2d 436 (8th Cir. 1987) (five-year-old boy described as "nonverbalizer" testified at trial); *United States v. Dorian*, 803 F.2d 1439 (8th Cir. 1986) (prosecution called the five-year-old victim to stand, but because of her age and obvious fright, she was unable to testify meaningfully); *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985) (eleven-year-old victim testified at trial); *United States v. Cree*, 778 F.2d 474 (8th Cir. 1986) (four-year-old physical abuse victim present in court but was not called to the stand); *Ellison v. Sachs*, 769 F.2d 955 (4th Cir. 1985) (victim's preliminary hearing statements, which had been subject to cross-examination, admitted only after five-year-old found incompetent to testify by state trial judge); *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980) (nine-year-old victim testified at trial), *cert. denied*, 450 U.S. 1001 (1981), *United States v. Frazier*, 678 F. Supp. 499, 502 (E.D. Pa. 1986) (three-year-old victim "confronted the defendant at trial and repeated her story and was questioned at length about her prior statements"). *See also Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050 (6th Cir. 1983) (excited utterances of four-year-old victim admitted even though she was ruled incompetent to testify by state trial judge), *cert. denied*, 464 U.S. 1070 (1984). *But see also United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979) (excited utterances and statements for medical purposes admitted even though four-year-old victim not called as a witness).

In the *Nelson* case, on the other hand, T.N. did not testify

at trial and the prosecution made no effort to produce her. Therefore, the court was obligated to search for particularized guarantees of trustworthiness before admitting T.N.'s statements as substantive evidence. But with full appreciation for the difficulties of all concerned in protecting the victim and prosecuting the perpetrator of child abuse, this court cannot conclude from this record, that T.N.'s statements to Dr. McLean bore sufficient indicia of reliability to overcome the weighty presumption against the admission of uncross-examined evidence. *See Lee v. Illinois*, 476 U.S. 530, 546 (1986). Therefore, the court holds that the substantive use of T.N.'s statements to Dr. McLean denied Brian Nelson's rights guaranteed by the Confrontation Clause.

D. **Harmless Error**

Confrontation Clause violations are subject to harmless error analysis. *See Delaware v. Van Arsdall*, 475 U.S. 673, 680-84 (1986); *Burns v. Clusen*, 798 F.2d 931, 943 (7th Cir. 1986); *United States v. Bernard S.*, 795 F.2d 749, 756 (9th Cir. 1986). Thus, the admission of T.N.'s statements to Dr. McLean do not require habeas corpus relief even though there was a Confrontation Clause violation, if the error was so unimportant and insignificant that it may be deemed harmless, consistent with the Constitution. *See generally Chapman v. California*, 386 U.S. 18 (1966). When claiming harmless error, the prosecution has the burden of proving "beyond a reasonable doubt that the [constitutional] error complained of did not contribute to the verdict obtained." *Id.* at 24. In the context of trial, the issue is whether, absent the constitutionally-forbidden evidence, honest and fair-minded jurors might very well have brought in a not-guilty verdict. *See Id.* at 26.

Whether a violation of the Confrontation Clause is harmless depends upon a variety of factors, including: (1) the importance of the evidence to the prosecution's case; (2) the overall strength of the prosecution's case; (3) the presence of corroborating evidence; and (4) whether the evidence was cumulative. *See Van Arsdell*, 475 U.S. at 684. In this case the respondent takes the

position that any error was harmless because "on the critical issue of whether sexual contact occurred and whether the petitioner was the assailant, the statements made by T.N. to Dr. McLean parallel and are clearly cumulative to the hearsay statements of T.N. related by Susan Nelson [T.N.'s mother], Dr. Silberglitt [the prosecution's expert witness] and Dr. Nichols [the defendant's expert witness]." Brief of Respondent at 42.

Considering the factors in order, the court concludes that: (1) the statements were critically important to the prosecution's case in that they described sexual contact and could be interpreted to identify the defendant as the perpetrator; (2) the prosecution's overall case was not strong in that there was no physical evidence, no eyewitness testimony, no contemporaneous reactive statements by the victim, and no admissions by the defendant, *see United States v. Shue*, 766 F.2d 1122, 1133 (7th Cir. 1985) (the case against the defendant must be "overwhelming" in order to apply the harmless error rule), *cert. denied*, 108 S. Ct. 351 (1987); and (3) there was no independent corroborating evidence of the essential elements of the crime. As to the fourth factor, the respondent characterizes the statements made to Dr. McLean as merely cumulative to the statements reported by Susan Nelson and by Drs. Silberglitt and Nichols. However, of the four witnesses, Dr. McLean, who had conducted approximately 59 sessions with T.N., gave the most extensive account of statements she had made pertinent to the charge against Brian Nelson. Susan Nelson, who had previously made an unsuccessful attempt to curtail her former husband's visiting rights, testified only to statements made by T.N. which led her to contact Dr. McLean for help in stopping visitation. These statements alone could not have established the elements of the crime. While Susan Nelson was a fact witness, Drs. Silberglitt and Nichols testified as experts in the field of clinical psychology. They did not treat T.N., but based their diagnosis of her on single interviews during which she provided limited information. Thus, the statements admitted through the testimony of Dr. McLean differed in quantity and quality from the statements admitted through the testimony of the other three witnesses and cannot be characterized as merely cumulative.

Having reviewed these factors, the court concludes that the respondent has not met his burden of proving beyond a reasonable doubt that the Confrontation Clause error did not contribute to the jury's verdict of guilty in this case. Therefore, the error was not harmless.

ORDER

Having concluded that the admission of T.N.'s statement to Dr. McLean violated Brian Nelson's Sixth Amendment right to confront a witness against him, the court must fashion appropriate relief "as law and justice require." 28 U.S.C. § 2243. Even though the court has ruled that the petitioner's rights were violated, the prevailing practice is to delay the petitioner's discharge so as to allow the state reasonable time in which to retry the petitioner if it wishes to do so. *See Whitley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 569 (1971); *Warden, Wyoming State Penitentiary*, 401 U.S. 560, 569 (1971); *Clausen v. Clerk of Circuit Court of Milwaukee County*, 537 F. Supp. 1233, 1237 (E.D. Wis. 1982).

Accordingly, the court ORDERS that Brian Nelson's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (filed January 13, 1988) IS GRANTED unless trial is commenced within seventy (70) days of the date of this order.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 10th day of June, 1988.

Thomas J. Curran
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

June 21, 1989.

Before
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

No. 88-2292
BRIAN NELSON,
Petitioner-Appellee,
v.
CATHERINE FARREY,
Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 88 C 35

Thomas J. Curran, *Judge*

ORDER

On June 8, 1989, petitioner-appellee filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

Supreme Court, U.S.
FILED
NOV 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-296 (2)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

BRIAN NELSON,

Petitioner,

v.

CATHERINE FARREY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Seventh Circuit hold, as a matter of law, that the prosecution need not make a showing of unavailability prior to the admission of statements made by a child to a psychiatrist for purposes of medical diagnosis or did the Seventh Circuit hold, on the facts of this case, that the child was unavailable to testify at trial and that the hearsay statements of the child as related by the psychiatrist bore sufficient indicia of reliability?

TABLE OF CONTENTS

Page

SUPPLEMENTAL STATEMENT OF FACTS 1

REASONS FOR DENYING THE WRIT 2

There is no reason to grant discretionary review of a court of appeals' decision which correctly holds, on the facts of this case, that the child sexual assault victim was unavailable to testify at trial and that the hearsay statements of the child related by the psychiatrist bore sufficient indicia of reliability. 2

A. The legal analysis employed by the court of appeals does not require certiorari review by the court. 3

B. The procedural history of the case does not support the request for certiorari review by the court. 16

CONCLUSION 23

CASES CITED

Burns v. Clusen,
798 F.2d 931 (7th Cir. 1986) . . . 9

Dutton v. Evans,
400 U.S. 74 (1970) 17, 21

Nelson v. Farrey,
No. 88-2292 . . . . . 2, 13-15

Ohio v. Roberts,
448 U.S. 56 (1980) . . . 3, 4, 14, 22

Reardon v. Manson,
806 F.2d 39 (2d Cir. 1986) . . 17, 21

State v. Nelson,
138 Wis. 2d 418,
406 N.W.2d 385 (1987) 19

United States v. Inadi,
475 U.S. 387 (1986) . 4, 5, 13, 15,
17, 21, 22

Washington v. Harris,
650 F.2d 447 (2d Cir. 1981) . . . 19

No. 89-296

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

SUPPLEMENTAL STATEMENT OF FACTS

The statement of facts in the petition is accurate but very selective. The respondent incorporates by reference the more detailed statement of facts contained

in the court of appeals' opinion, Nelson v. Farrey, No. 88-2292 (R-Ap. 2-6). The court of appeals' opinion is reproduced in an appendix to the petition for a writ of certiorari. However, the appendix to the petition contains no page references and therefore cannot be cited in this response. The respondent has reproduced the court of appeals' opinion in an appendix with page numbers.

REASONS FOR DENYING THE WRIT

There is no reason to grant discretionary review of a court of appeals' decision which correctly holds, on the facts of this case, that the child sexual assault victim was unavailable to testify at trial and that the hearsay statements of the child related by the psychiatrist bore sufficient indicia of reliability.

A. The legal analysis employed by the court of appeals does not require certiorari review by the court.

The issue raised in the petition for a writ of certiorari is not deserving of this Court's review because it does not raise a substantial constitutional question having broad application and needing resolution by this Court. Although the terminology and analysis adopted by the majority opinion is somewhat creative, the three circuit judges concluded that petitioner's sixth amendment right to confrontation was not violated because the record demonstrated that the child was unavailable to testify at trial because of emotional trauma and because the hearsay statements of the child bore sufficient indicia of reliability. Ohio v. Roberts, 448 U.S. 56, 65, 66 (1980).

The petitioner attempts to create an issue for discretionary review by arguing

that the court of appeals' opinion impermissibly extended this Court's holding in United States v. Inadi, 475 U.S. 387 (1986). The precise holding in Inadi is that the unavailability requirement of Roberts is inapplicable to the admission at trial of the hearsay statements of a nontestifying co-conspirator. This court held that, unlike prior testimony evaluated in Roberts, which is merely a substitute for in-court testimony, statements made during the course of a conspiracy have an evidentiary significance that cannot be duplicated by in-court testimony. The availability of the hearsay declarant is of little utility in evaluating the reliability of this evidence. Id., 475 U.S. at 395-96.

The petitioner asserts that the court of appeals applied the Inadi rule to the

present case and concluded, as a matter of law, that a showing of unavailability is no longer required for the admission of hearsay statements made for medical diagnosis. Contrary to petitioner's assertion, the court of appeals' decision is not based on this narrow legal holding. There is substantial evidence in the state record showing the child victim's unavailability. This evidence was considered and discussed in both the majority and concurring opinions. A decision by this Court that the Inadi rule should not be extended to dispense with the unavailability requirement in cases where hearsay statements are admitted under the medical diagnosis exception would not result in a reversal of the court of appeals' judgment.

The majority opinion of the court of appeals suggests two possible approaches to understanding the relationship between the admission of hearsay evidence and a defendant's constitutional right to confrontation. The first method of analysis is described in the majority opinion as "symbolic" (R-Ap. 9). Under this approach, a heavy emphasis is placed on the out-of-court declarant's unavailability to testify. The court is primarily concerned that the prosecution does not gratuitously circumvent the adversarial process by presenting evidence at second hand (R-Ap. 8-9). The second method of analysis suggested by the majority opinion is described as "functional" (R-Ap. 9). This approach focuses on the utility of cross-examination and forbids the admission of hearsay

evidence which is unreliable. The unavailability requirement is relevant under this analysis to show the necessity for introducing an out-of-court statement (R-Ap. 9-10).

The majority opinion concludes: "Under either approach, Nelson must lose" (R-Ap. 10). The symbolic aspect of the confrontation clause was not violated because there was no attempt by the prosecution to circumvent the adversary process. The reason for the child victim's absence from trial was explained by the testimony of the attending psychiatrist. The court of appeals summarized this testimony:

> Dr. McLean testified that T. would resist direct questioning about sexual incidents with her father. To elicit truthful answers, he opined, would have required protracted inquiry in a relaxed setting--conditions impossible to create in a

> courtroom with T.'s father present. The attempt to extract evidence from her in a courtroom setting was likely to be not only futile but also psychologically harmful to her.

(R-Ap. 10.)

Similarly, the functional aspect of the confrontation clause was not violated because the hearsay statements of the child admitted through the testimony of the doctor were sufficiently reliable. In assessing the reliability of the hearsay statements, the court of appeals noted that there was no dispute in the record that the three-year-old child was sexually abused. The only issue at trial was the identity of her assailant. The statements made by the child to her psychiatrist, Dr. McLean, which identified the petitioner as her assailant were corroborated by statements made to her mother, a social worker, and

two other psychiatrists. The court of appeals noted:

> Remember that the only challenged testimony is that of Dr. McLean. The other hearsay evidence, much of it as damning as McLean's, was admitted without objection. Some of that evidence was given by Dr. Nichols, who was Nelson's own witness. The hearsay evidence that was admitted without objection provided strong corroboration for the statements that T. had made to Dr. McLean.

(R-Ap. 11.)

The petitioner's request for discretionary review in this Court rests on a single statement contained in the majority opinion. In the concluding paragraph of the opinion, the author for the majority states: "Anyway T.'s unavailability was not a constitutional sine qua non of allowing her out-of-court statements to be used in evidence against her father" (R-Ap. 14). This statement must be read in context of the majority's

conclusion that its ruling was not in conflict with its earlier decision in Burns v. Clusen, 798 F.2d 931 (7th Cir. 1986). The statement objected to by petitioner appears in the concluding paragraph of the majority opinion:

> Burns v. Clusen, 798 F.2d 931 (7th Cir. 1986), on which Nelson relies heavily, does not compel a contrary result. Granted, "a witness cannot be declared 'unavailable' simply because the prosecutor or [trial] court concludes that the witness might not want to testify," id. at 942, and maybe that was such a case. This case cannot be so characterized. The victim in Burns was an adult with a fluctuating mental condition, and the only determination of her availability to testify was made two months before the trial, whereas here the trial judge's post-trial hearing determined that at the time of trial T. had been incapable of testifying without risk of serious psychological harm. Anyway T.'s unavailability was not a constitutional sine qua non of allowing her out-of-court statements to be used in evidence against her father. And how

> ironic it would be if the child molester could use the trauma inflicted on his victim as the fulcrum for levering his way to freedom.

(R-Ap. 13-14; emphasis added.)

The attorney for the respondent must admit in all candor that he does not fully understand the significance of the statement highlighted in the concluding paragraph of the majority opinion. However, this statement cannot be fairly read as a holding by the majority that, as a matter of law, the prosecution need not make a showing of unavailability prior to the admission of statements made by a child to a psychiatrist for purposes of medical diagnosis. It would appear that the author of the majority opinion is stating, as an alternative basis for decision, that, under the facts of this case, a showing of

unavailability was not constitutionally required.

The respondent does not believe the court of appeals would have reached this alternative basis for decision except for the fact that the record contained psychiatric opinion testimony that the young child was terrified of her father and would not answer questions in his presence and that the child would not respond to questioning about the sexual assault in any non-therapeutic setting. A psychiatrist testified that the child had suffered severe emotional trauma which had required fifty-nine treatment sessions up to the time of trial and that any attempt to question her in a non-therapeutic setting would increase the likelihood and severity of a regressive trauma (R-Ap. 5-6). The same body of evidence on which the state

trial court relied to find that the child was unavailable is used by the court of appeals to also conclude that "[t]here is no basis for believing that T.'s testifying would have enhanced the accuracy of the jury's determination" (R-Ap. 13).

The alternative basis for decision reflected in the concluding paragraph of the majority opinion is tied to the particular facts of this case including psychiatric evidence that the child could not give meaningful testimony at trial because of her young age and emotional trauma. This case does not present a good vehicle for the Court to consider whether its holding in Inadi should be extended to situations where hearsay statements of a young sexual assault victim are introduced at trial under the medical diagnosis exception to the hearsay statute.

The petition also asserts that the Nelson decision relieves the prosecution of any obligation to produce young sexual assault victims and opens the door to the prospect of sexual abuse trials conducted solely on the basis of hearsay statements related by psychiatrists and social workers.

The respondent submits that a fair reading of the Nelson decision does not support this scenario. The record indicates that the state trial court made a finding of unavailability based on psychiatric opinion testimony. The evidence of unavailability is discussed in both the majority and concurring opinions. The majority opinion concludes that, under the symbolic approach to the confrontation clause, the psychiatric evidence concerning the child's emotional and mental state

relieved the prosecution of its obligation to produce the child as a witness at trial (R-Ap. 10). The concurring opinion concludes that the Roberts requirement of unavailability was satisfied because of two facts in the record: first, the psychiatrist's opinion that the child was unable to give meaningful testimony at trial because of her emotional trauma, and second, the defense's failure to introduce any evidence "that even obliquely questioned the validity of this assertion" (R-Ap. 20). The prosecution's obligation to produce young sexual assault victims, or in the alternative, make a showing of unavailability, remains intact after the Nelson decision.

B. The procedural history of the case does not support the request for certiorari review by the court.

The respondent would also point out that the prosecution did not advocate in the court of appeals that the Inadi decision should be extended to relieve the state of its burden to show unavailability in cases where it intended to introduce hearsay statements of young sexual assault victims.

The respondent made two arguments in the court of appeals. First, the respondent argued that the finding of unavailability made by the state trial court at the postconviction hearing was fairly supported by the record. Second, the respondent argued that it was apparent from the record that petitioner's trial counsel recognized that the young child was traumatized by the sequence of sexual

assaults and would not be available to testify in any meaningful way at trial.

This court has recognized that the prosecution's obligation to show unavailability will not be enforced when the record demonstrates that the utility to the defense of producing the witness is remote. Inadi, 475 U.S. at 397-98; Dutton v. Evans, 400 U.S. 74, 88 n.19 (1970); see Reardon v. Manson, 806 F.2d 39, 42-43 (2d Cir. 1986).

The state trial court record indicated that petitioner's trial counsel was aware that the prosecution did not intend to call the young child as a witness at trial and that the psychiatric evaluation of the doctors would support the reasonableness of this decision. The defense had obtained in discovery the therapy session notes and psychiatric evaluation of Dr. McLean and

Dr. Silberglitt which explained in detail the traumatized condition of the child. The defense had retained two psychologists who had examined the child and the therapy session notes of Dr. McLean. The evaluation made by the defense psychologists substantially confirmed that the child had been severely traumatized by some sexual experience.

The state trial court record also revealed that petitioner's trial counsel did not make proper objection on confrontation grounds to the testimony of Dr. McLean and never requested an evidentiary hearing on the issue of unavailability. When the issue of confrontation was first raised at trial, on a motion to dismiss at the close of the state's case, petitioner's trial counsel did not dispute the evaluation of the child

made by the prosecution's psychiatrists or represent that the defense experts were prepared to offer a different opinion. Instead, trial counsel merely argued that the prosecution had not met its burden because it had not considered the possibility of videotaping the child in her home, at Dr. McClean's office or in some other non-courtroom setting.

The respondent pointed out to the court of appeals that the Wisconsin Supreme Court had ruled that petitioner's trial counsel had not made proper objection on confrontation grounds in order to place on the state the affirmative obligation to make a showing of unavailability. State v. Nelson, 138 Wis. 2d 418, 439, 406 N.W.2d 385 (1987). However, since the Wisconsin Supreme Court declined to enforce its waiver rule and considered the

confrontation issue on its merits, there was no independent state ground which would bar review of the unavailability issue in a federal habeas action. Washington v. Harris, 650 F.2d 447, 452 (2d Cir. 1981).

Nevertheless, the respondent argued in the court of appeals that the failure of any proper objection and the absence of any evidence offered to rebut the expert opinion of the prosecution's psychiatrists was relevant on the broader issue of whether the record showed that the utility to the defense of the child's appearance at trial was remote.

The respondent asked the court of appeals to conclude that, under the facts of this case, no separate finding of unavailability was necessary. The respondent did not suggest that, in every case involving the sexual assault of a

young child, hearsay statements should be admitted without a showing of unavailability. Rather, in this particular case, the record clearly demonstrated that both the prosecution and the defense recognized that the young child was traumatized by the event and would not be available to testify in any meaningful way at trial. The utility of calling the child as a witness at trial was remote. Inadi, 475 U.S. at 397-98; Dutton, 400 U.S. at 88 n. 19; Reardon, 806 F.2d at 42-43. There was no serious dispute concerning this fact until the petitioner, with the assistance of new counsel, filed postconviction motions in the state trial court.

The respondent believes the procedural history of this case and the petitioner's failure at any point in the proceedings to introduce evidence which would dispute the

psychiatrist's evaluation of the emotional condition of the child presents an additional reason why a writ of certiorari should not be issued. At no point did this case proceed on the assumption or prospect that the Inadi decision relieved the prosecution of its burden to show unavailability under Roberts. This case was introduced into the federal courts primarily because the hearing on unavailability was held after the conclusion of the state trial. The respondent believes the record shows that the delay in holding a hearing on unavailability was occasioned by trial counsel's failure to properly object to Dr. McLean's testimony on confrontation grounds and because trial counsel tacitly recognized that the traumatized child could not give meaningful testimony at trial.

This is not an appropriate case for the Court to consider the applicability of the Inadi decision to hearsay statements admitted under the medical diagnosis exception.

CONCLUSION

For the reasons stated above, the respondent respectfully submits that the petition for writ of certiorari should be denied.

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W3387

A P P E N D I X

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-2292

BRIAN NELSON,

Petitioner-Appellee,

v.

CATHERINE FARREY,

Respondent-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 88 C 35—**Thomas J. Curran,** *Judge.*

ARGUED JANUARY 17, 1989—DECIDED MAY 17, 1989

Before WOOD, JR., POSNER, and FLAUM, *Circuit Judges.*

POSNER, *Circuit Judge.* A Wisconsin jury convicted Brian Nelson of first-degree sexual assault on his daughter, "T.," who had been three years old at the time of the crime. The judge sentenced Nelson to five years in prison. After exhausting his state remedies, see *State v. Nelson*, 138 Wis. 2d 418, 406 N.W.2d 385 (1987), Nelson sought federal habeas corpus. The district court held that he had been convicted in violation of his rights under the confrontation clause of the Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"). 688 F. Supp. 1304 (E.D. Wis. 1988). T. had not testified at

Nelson's trial, but statements that she had made to a psychologist had been admitted into evidence through the psychologist's testimony, improperly in the district judge's view. The state appeals.

A growing sensitivity to the prevalence of child abuse in our society has caused an upsurge of prosecutions. See generally Note, *To Keep the Balance True: The Case of Coy v. Iowa*, 40 Hastings L.J. 437 (1989). Such prosecutions place a strain on traditional notions of procedural justice. See, e.g., Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. Rev. 257 (1989); Tuerkheimer, *Convictions Through Hearsay in Child Sexual Abuse Cases: A Logical Progression Back to Square One*, 72 Marq. L. Rev. 47 (1988). This is especially so when, as in the present case, the crime has left no physical traces, the child is very young and is directly or indirectly the principal witness against the alleged abuser, and the case involves incest, thus pitting child against parent.

Brian and Susan Nelson, T.'s parents, were divorced in 1982, when T. was two years old. Susan received custody of the child, and Brian received visitation rights. According to Susan Nelson's testimony, beginning in August 1983 T. would become apprehensive and even hysterical when Brian Nelson came to pick her up. After one of the visits T. begged her mother not to make her go to her father's house again. By October, T. would go "berserk" when told she was going to her father's house; she would cry and scream and beg not to be forced to go. The visits ceased for a time but resumed around Christmas. Shortly after their resumption, T. tried to pull her mother's pants down while playing tag, explaining that daddy had taught her to play tag this way. T. also insisted to her mother that a picture of Michael Jackson, the popular singer, be brought into the bathroom to watch her. T. pointed to her vagina and said that Michael Jackson doesn't look like this and "daddy doesn't look like this either." When her mother asked her how she knew this, T. replied, "I pulled his underpants down." Susan told T. it

must have been an accident, but T. insisted that daddy had told her to pull down his underpants and that it was all right because Cheryl (the defendant's new wife) was not at home. T.'s visits to her father now ceased for good. Suspecting that Nelson was sexually abusing T., Susan retained Dr. Donald McLean, a clinical psychologist whose name Susan had been given by the domestic relations court when she had asked the court whether she "had to force" T. to visit Brian Nelson.

All this was according to Susan Nelson, to whose testimony the defendant did not object. The spotlight now switches to Dr. McLean, who testified for the state as an expert witness and whose testimony was objected to on the grounds both that it was inadmissible hearsay and that its admission infringed Nelson's constitutional right to confront his accuser.

McLean had held 59 evaluation and treatment sessions with T. between January and September 1984. (The sessions ended on the eve of Brian Nelson's criminal trial; he had been indicted in April.) The sessions were conducted mainly in McLean's "play therapy room," which was equipped with dolls and other toys. "Play therapy" is an established technique for obtaining information about the feelings and problems of young children. See, e.g., Axline, Play Therapy: The Inner Dynamics of Childhood (1947). According to McLean's testimony, T. revealed at several sessions that (in his words) she had "touched daddy where he went to the bathroom." McLean placed "anatomically correct" male and female dolls in the play therapy room and T. in one of the early sessions placed the female doll's face against the male doll's genitalia and said, "she gets mud on her face." Asked what she meant, she replied, "it's white and sticky." T. told McLean that her father had told her not to talk about the incident and also had told her to say that Mitch (Mitchell Blada, who had moved in with Susan after the divorce) had done it.

McLean related the following conversation he had had with T. at one of the sessions: "Do you pull someone's

underpants down and touch him where he goes to the bathroom, and the child said yes . . . and I said, well, who is it that you touch where he goes to the bathroom, and the child answered Mitch. And I said you told me it was Daddy. Was it Mitch or Daddy, and the child said Daddy. And I said then why did you say Mitch, and she said it was Mitch, and I said then it was not Daddy. She said it was Daddy, then Mitch, then Daddy, and she answered with he told me to say it was Mitch. I said who told you to say it was Mitch. She said Daddy." When Dr. McLean asked T. whether she would tell only the truth to anyone who talked to her, she replied, "I don't have to tell the truth." McLean further testified that throughout the sessions T. was very anxious, and that she was both reluctant to talk about the incidents involving her father and very hostile to him. At one session, after again describing fellatio with her father in the bathroom, she became extremely agitated and said she was "mad" at her father. She began beating the male anatomically correct doll and throwing it around the room. She said she was beating "Daddy Brian."

The state called another clinical psychologist, Dr. Burton Silberglitt, as an expert witness. The defendant did not object to his testimony, which was based on a single interview with T. in March 1984. Dr. Silberglitt testified that T. had tried to avoid discussing her father because, in his words, it was "discomforting to her and frightening to her and traumatic to her to get into this." She had, however, told Silberglitt that she "played with his thing that he put in the toilet." Silberglitt also testified that T. had said, referring to her father, that "whatever came out of his pants was sticking out, and [she] indicated to me, you know, made a motion of an erect penis." He also testified that T. was very agitated and required therapy. Another witness who testified for the state without objection was a social worker, Mary Anne Jensen. She testified that in January 1984 T. had drawn a picture of herself and her father. The picture, which was admitted into evidence without objection, depicts the defendant as an erect penis.

When the state rested its case, Nelson moved for dismissal on the ground that the testimony about what T. had said was hearsay and that the state had failed to show that T. was unavailable to testify either in person or, at the very least, through a videotape of the play therapy sessions; therefore the admission of the hearsay violated his right of confrontation. (But of course a videotape would not have cured the absence of confrontation.) The judge denied the motion to dismiss, ruling that T.'s age—four at the time of trial—and the testimony of the two psychologists concerning the traumatic impact on her of having to testify about her father's conduct made her unavailable to testify at trial, and concluding that therefore her out-of-court statements were admissible.

The trial then resumed, and two psychologists testified for the defense. Dr. David Nichols, who had interviewed T. in March 1984 at Nelson's request, testified that the interview had revealed little about the alleged sexual assaults but that T. had told him that she did not like to visit her father and that she "gets white mud on her face." Nichols had concluded that sexual abuse had occurred, and had recommended to the domestic relations court that Nelson not be permitted to visit with T. The other psychologist, Dr. Walter McDonald, had not interviewed T. but had examined Dr. McLean's clinical notes. McDonald agreed that T. was suffering from anxiety, anger, and trauma, but speculated that her increasing sexual preoccupation during the therapy sessions with McLean might have been a consequence of the presence of anatomically correct dolls. He acknowledged, however, that this theory was no more plausible than McLean's, which was that the defendant *had* sexually abused T.

After the trial, Nelson asked the trial judge to set aside his conviction, and in April 1985 the judge held an evidentiary hearing to determine once again whether T. had been unavailable to testify at the trial. The only witness called by either side was Dr. McLean (the state called him), who testified that T. would not have responded to direct questioning about the sexual contacts with her fa-

ther, that such questioning could have had a traumatic effect on her, that she was fearful of her father, and that his presence in the courtroom while she testified would have harmed her psychologically. McLean acknowledged that therapy sessions with T. could have been videotaped but pointed out that a large number of the sessions would have had to be taped, because she had volunteered information about the sexual incidents with her father only gradually and intermittently. Nelson declined to present any evidence on the question of T.'s availability to testify at his trial, arguing that the seven-month lapse of time between the trial and the hearing prevented him from adducing meaningful evidence. The judge disagreed, and concluded that T. had indeed been unavailable to testify at trial.

Whether the Supreme Court of Wisconsin correctly found that the admission into evidence of T.'s statements to Dr. McLean did not violate Wisconsin's hearsay rule is an issue of state law; it is nothing to us. The only question for us is whether the admission of those statements, as the district court believed, denied Brian Nelson his Sixth Amendment right (held applicable to state prosecutions in *Pointer v. Texas*, 380 U.S. 400, 403-04 (1965)) to confront the witnesses against him. In a literal sense it did not, since T. was not a witness. The prosecution witnesses were Nelson's ex-wife, the two psychologists called by the state, and the social worker. Nelson had every opportunity to confront *them*—to look them in the eye and make them quail under his righteous gaze. This case is not like *Coy v. Iowa*, 108 S. Ct. 2798 (1988), where the child witnesses testified behind a screen that prevented the defendant from establishing eye contact with them. It is true that T. was an indirect witness, but if the per se rule of *Coy* were extended to indirect witnesses—that is, to out-of-court declarants—the effect would be to outlaw all hearsay evidence, something the Supreme Court plainly is not minded to do.

If the literal sense of the confrontation clause were its only sense, Nelson would have no case. He would be en-

titled to confront only those persons who actually testified at his trial, and T. was not one of them. But interpreted literally the clause could easily be evaded: instead of calling eyewitnesses to a crime to testify, the state could put on witnesses who would merely recite what those eyewitnesses had told them. This might not be the end of the world. The defendant might be able to use his Sixth Amendment right of compulsory process (held applicable to the states in *Washington v. Texas*, 388 U.S. 14 (1967)) to get the eyewitnesses into court, where he could confront them. See Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 183 (1974). Of course, this would require a nonliteral reading of the compulsory process clause, which as written merely entitles the defendant "to have compulsory process for obtaining witnesses *in his favor*" (emphasis added), and we are speaking here of *prosecution* witnesses. This approach would also require that the compulsory process clause be read to have abrogated the common law rule that forbids a party to impeach any witness called by him; in other words it would require constitutionalizing Rule 607 of the Federal Rules of Evidence. *Chambers v. Mississippi*, 410 U.S. 284 (1973), suggests that the voucher rule does indeed violate the Sixth Amendment—but the confrontation clause, not the compulsory process clause. Additional interpretation would be required to expand the compulsory process clause from a help in mounting a defense (see, e.g., *Pennsylvania v. Ritchie*, 480 U.S. 39, 55-56 (1987); *United States v. Davis*, 772 F.2d 1339, 1347-48 (7th Cir. 1985)) to a help in confronting the prosecution's nontestifying witnesses. See *United States v. Oates*, 560 F.2d 45, 82 n. 39 (2d Cir. 1977). This may be why *Chambers* suggests that the voucher rule, which limits the defendant's ability to cross-examine eyewitnesses whom the prosecution declines to call, offends against the confrontation clause rather than against the compulsory process clause. There is no escaping the uncertainties of interpretation by switching the focus from the confrontation clause to the compulsory process clause.

At all events the law has developed along different lines. The confrontation clause has been held not only to entitle the criminal defendant to confront (literally) and cross-examine the witnesses whom the prosecution does call, but also to place limits on the prosecution's use of hearsay evidence. But it is not clear what those limits are. In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Supreme Court said that hearsay evidence was inadmissible against a criminal defendant unless the declarant was unavailable to testify *and* the hearsay evidence was reliable; moreover, evidence that did not fit within a well-established exception to the common law rule excluding hearsay evidence would be deemed reliable only if it had "particularized guarantees of trustworthiness." *Id.* at 66. The Court hedged the requirement of unavailability, however, by prefacing it with the statement: "In the usual case," *id.* at 65—rather a backhanded allusion to the fact that Rule 803 of the Federal Rules of Evidence contains 24 exceptions to the requirement that the declarant be unavailable to testify in order for hearsay to be admissible, and presumably the Constitution imposes looser rather than tighter limitations on the use of hearsay evidence than the Federal Rules of Evidence. Six years later the Supreme Court disavowed any suggestion that *Roberts* had stated a general rule, confined the case to the particular situation presented by it—a prosecutor's attempt to use the transcript of testimony from a previous judicial proceeding in lieu of live testimony at trial—and allowed the admission of out-of-court statements by a co-conspirator who was available to testify. See *United States v. Inadi*, 475 U.S. 387 (1986).

At present, then, there is no single authoritative criterion for when the admission of hearsay evidence violates a defendant's constitutional right to confrontation. We can imagine two possible approaches. One would be to confine the right to situations in which the prosecutor appears to be trying to circumvent the literal right of confrontation (the right vindicated in *Coy*) by presenting evidence at second hand, as in the hypothetical eyewitness

case that we gave earlier, or in the *Roberts* case itself. As noted by Justice Harlan in a scholarly concurring opinion in *California v. Green*, 399 U.S. 149, 180 (1970), "the early decisions that consider the confrontation right at any length all involved ex parte testimony submitted by deposition and affidavit." "[T]he paradigmatic evil the Confrontation Clause was aimed at [was] trial by affidavit." *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring). See also *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). Trial by affidavit conjures up the image of inquisitorial procedure, and in this light *Coy* can be understood as a symbolic vindication of the adversary character of Anglo-American criminal procedure—symbolic because the trial of Coy was neither a trial by affidavit nor an inquisitorial-type proceeding. See *The Supreme Court, 1987 Term: Leading Cases*, 102 Harv. L. Rev. 143, 158-59 (1988). Admittedly that is not the timbre of the *Coy* opinion. The Court's emphasis is on the etymology of "confrontation" rather than on the symbology of the adversarial process. See 108 S. Ct. at 2800. But the Court was not dealing with a case in which the state had attempted to substitute an inquisitorial process for the adversary process that is the norm in Anglo-American criminal justice.

Under what we are calling the "symbolic" approach a heavy emphasis would be placed on the out-of-court declarant's unavailability to testify. For if he were available yet not called, it would look as if the state were trying to circumvent the adversarial process gratuitously.

The other approach, which is functional rather than either symbolic or literal, which focuses on cross-examination rather than (more precisely, in addition to) the making of eye contact with the prosecution's witnesses, and which also has considerable support in the cases, see, e.g., *Olden v. Kentucky*, 109 S. Ct. 480, 483 (1988) (per curiam), is to forbid the admission of hearsay evidence so likely to be unreliable that it threatens a miscarriage of justice, which is to say, the conviction of an innocent person. See, e.g., *Lee v. Illinois*, 476 U.S. 530 (1986). The declarant's

availability or unavailability is relevant under this approach only insofar as it bears on the appropriateness, in particular circumstances, of introducing evidence potentially less reliable than that of a witness testifying about his first-hand knowledge. On this approach the declarant's unavailability cuts both ways: it makes the admission of the out-of-court statement more needful, because the prosecution can't get the declarant to testify in person, but it also makes cross-examination of the declarant impossible.

Under either approach, Nelson must lose. Begin with the symbolic approach. The prosecutor was not trying to present T.'s testimony through surrogates so that Nelson would not be able to look her in the eye at trial or cross-examine her. There was no attempt to circumvent adversary process. Whether or not T. was "unavailable" in the sense in which this term is used in Rule 804 of the Federal Rules of Evidence or in its Wisconsin counterpart—and bear in mind that "unavailable" doesn't mean dead or a fugitive, but includes fearing for one's life, as in *United States v. Boulahanis*, 677 F.2d 586, 588 (7th Cir. 1982), or risking incriminating oneself, as in *United States v. Silverstein*, 732 F.2d 1338, 1346 (7th Cir. 1984)—Nelson does not suggest that the prosecutor had improper motives in failing to call T. as a witness, or even that a reasonable observer would have ascribed such motives to the prosecutor. Dr. McLean testified that T. would resist direct questioning about sexual incidents with her father. To elicit truthful answers, he opined, would have required protracted inquiry in a relaxed setting—conditions impossible to create in a courtroom with T.'s father present. The attempt to extract evidence from her in a courtroom setting was likely to be not only futile but also psychologically harmful to her.

Turning to the second approach, the functional, we ask whether the evidence of what T. had told other people—her mother, the three psychologists (including Dr. Nichols, one of the defendant's expert witnesses) who interviewed her, and the social worker—was sufficiently reliable to still

concerns that Nelson may have been the victim of a miscarriage of justice. The Wisconsin courts thought it was, and so do we. Remember that the only challenged testimony is that of Dr. McLean. The other hearsay evidence, much of it as damning as McLean's, was admitted without objection. Some of that evidence was given by Dr. Nichols, who was Nelson's own witness. The hearsay evidence that was admitted without objection provided strong corroboration for the statements that T. had made to Dr. McLean. The only suggestion that she might have fabricated her account of sexual abuse was Dr. McDonald's testimony that playing with anatomically correct male and female dolls might have caused T. to become preoccupied with sex. McDonald is not alone in being concerned that the use of such dolls "will stimulate fantasy and not recall," Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 Wash. L. Rev. 705, 711 (1987), but that concern is misplaced in the circumstances of the present case. For there cannot be any serious doubt that *someone* coerced T. into committing fellatio with him. Merely playing with anatomically correct dolls would not have given her the idea that one might be sprayed in the face with "white mud" from an erect penis; the dolls aren't *that* anatomically correct. The experience that T. narrated must have happened. The only question is whether Mitch or her father was the molester. And Dr. McDonald did not suggest that Mitch and Susan had attempted to frame Daddy Brian.

The question is not whether T.'s statements to McLean were in fact completely truthful and accurate, although the evidence admitted without objection makes it highly probable that they were. (And it appears that children rarely fabricate reports of sexual abuse. See Note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U.L. Rev. 155, 175-76 (1988); Comment, *Child Witnesses in Sexual Abuse Proceedings: Their Capabilities, Special Problems, and Proposals for Reform*, 13 Pepperdine L. Rev. 157, 158-60 (1985); Note, *A Comprehensive Approach to Child Hearsay Statements in Sex*

Abuse Cases, 83 Colum. L. Rev. 1745, 1751-53 (1983)—all reviewing empirical studies.) The question is whether allowing the statements into evidence created a serious danger of a miscarriage of justice. Dr. McLean is a qualified psychologist who treated T. over a period of months, conducted dozens of therapy sessions with her, and employed his professional skills in an attempt to elicit truthful statements. No one pretends that such a sifting process is infallible, but we are given no reason to suppose that it is so unreliable that a jury should be forbidden to consider it. If such evidence were never admissible, molesters of small children, especially incestuous molesters, would rarely be punished. It would have been a monstrous cruelty to force T. to testify—in a public courtroom, in the presence of the father she feared—to sexual abuse by her father. Who can believe that such a confrontation would have been more likely to elicit truth than to produce sordid drama?

The alternative suggested by the defendant—videotaping the therapy sessions—would not have been feasible. The sessions began before Dr. McLean knew that a criminal trial would ensue, so he can hardly be faulted for not having videotaped them from the start. And surely his clients would be shocked if he had a routine practice of videotaping therapy sessions with child victims of sexual abuse. Had he begun videotaping the sessions with T. after the defendant was charged (we don't know when McLean was informed that criminal charges were pending against the defendant), the defendant would now be objecting that the videotape evidence was unreliable because the earlier sessions had not also been videotaped. Then there is the problem of editing. A videotape of all the sessions would run many hours and be unbearably diffuse and tedious, but an edited version would tend to magnify the impact of T.'s statements about sexual abuse. Finally, since a videotape cannot be cross-examined and since Nelson does not question the accuracy of McLean's testimony (as distinct from the accuracy of the statements by T. to which McLean testified), the videotape evidence would not have assisted the defense. Indeed, the defense might well have

been hurt by the jury's seeing the little girl; it would have made the enormity of the defendant's crime more vivid.

Events conspired to prevent Brian Nelson from having a chance to cross-examine his principal accuser. He *was* convicted on hearsay evidence. But we should not allow labels and lawyers' pieties to delude us into believing that cross-examination of a four-year-old child concerning sexual abuse by her father a year earlier is a more effective method of discovering the truth than listening to and weighing the testimony of a competent psychologist who interviewed the child over a period of many months in a setting designed to elicit truthful communication. There is no basis for believing that T.'s testifying would have enhanced the accuracy of the jury's determination. "[A] growing number of experts argue that the testimony of child-abuse victims is more reliable if they *cannot* see the defendant," *The Supreme Court, 1987 Term: Leading Cases*, *supra*, 102 Harv. L. Rev. at 157 (emphasis in original; footnote omitted); for empirical support see Note, *Videotaping Children's Testimony: An Empirical View*, 85 Mich. L. Rev. 809, 814-17 (1987). There is no basis for believing that the evidence which the jury did have was insufficiently reliable to support a criminal conviction. See *United States v. St. John*, 851 F.2d 1096 (8th Cir. 1988); *Morgan v. Foretich*, 846 F.2d 941, 946 (4th Cir. 1988); *United States v. Cree*, 778 F.2d 474, 477-78 (8th Cir. 1985); *United States v. Nick*, 604 F.2d 1199, 1204 (9th Cir. 1979)—all cases upholding the admission of out-of-court statements made by child victims of sex abuse.

Burns v. Clusen, 798 F.2d 931 (7th Cir. 1986), on which Nelson relies heavily, does not compel a contrary result. Granted, "a witness cannot be declared 'unavailable' simply because the prosecutor or [trial] court concludes that the witness might not want to testify," *id.* at 942, and maybe that was such a case. This case cannot be so characterized. The victim in *Burns* was an adult with a fluctuating mental condition, and the only determination of her availability to testify was made two months before the trial, whereas here the trial judge's post-trial

hearing determined that at the time of trial T. had been incapable of testifying without risk of serious psychological harm. Anyway T.'s unavailability was not a constitutional sine qua non of allowing her out-of-court statements to be used in evidence against her father. And how ironic it would be if the child molester could use the trauma inflicted on his victim as the fulcrum for levering his way to freedom.

The judgment of the district court is reversed with directions to deny the application for habeas corpus.

REVERSED.

FLAUM, *Circuit Judge*, concurring.

I concur in the judgment of the court reversing the grant of the writ of habeas corpus. I write separately to set forth my views on the appropriate method of analysis in determining whether the admission of T's statements to Dr. McLean conformed to the requirements of the Confrontation Clause. In particular, I do not agree with the majority's assertion that "T's unavailability was not a constitutional sine qua non of allowing her out of court statements to be used in evidence against her father." Rather, I believe that the Confrontation Clause required the prosecution to show that T was not available to testify at trial and that the statements themselves had particularized guarantees of trustworthiness. In my view, the prosecution has complied with both requirements. Consequently, I believe that the admission of T's statements through Dr. McLean did not violate the defendant's sixth amendment rights.

I.

In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Supreme Court appeared to fix both the unavailability of the declarant and the reliability of the statement as enduring

lodestars in Confrontation Clause cases. In *Roberts*, a case involving testimony given at a preliminary hearing, the Court stated that generally, "the prosecution must either produce, or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant." *Id.* at 65. The Court, however, emphasized that a showing of unavailability is not required in all situations. *Id.* at 65 n.7.

The general language contained in *Roberts* prompted many courts to conclude that a demonstration of the declarant's unavailability was a constitutional pre-condition to the admission of most hearsay statements. *See United States v. Caputo*, 758 F.2d 944, 950 n.2 (3rd Cir. 1985) (collecting cases). The validity of this interpretation of *Roberts*, however, is suspect in view of *United States v. Inadi*, 475 U.S. 387 (1986). The precise holding in *Inadi* was that no unavailability showing is required when statements are admitted pursuant to Federal Rule of Evidence 801(d)(2)(E)—co-conspirator statements made during the course and in furtherance of the conspiracy. The Court justified this result on three grounds. First, the Court found that these statements derive much of their significance from the context in which they are made and that this context cannot be replicated at trial. *Id.* at 395. Second, the Court noted that the declarant will often have a motive to testify falsely about the statements in view of the specter of imminent indictment or prosecution. *Id.* Finally, the Court emphasized that the benefit to the defendant of having a co-conspirator testify is minimal and is substantially outweighed by the burden to the prosecution resulting from an unavailability requirement. *Id.* at 396-400. In the course of the opinion, however, the Court employed language that could be interpreted as repudiating the unavailability discussion in *Roberts*.

The *Inadi* decision has created an unfortunate vacuum in the Confrontation Clause realm, for at present it is not clear if a showing of unavailability is required for most types of hearsay statements. *See Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diag-*

nosis or Treatment, 67 N.C.L. Rev. 257, 289 n.9 (1989). Given its broadest construction, *Inadi* stands for the proposition that the unavailability of the declarant is a relevant constitutional factor only when the hearsay statements involve testimony given at a preliminary hearing. In my view, however, *Inadi* does not represent a repudiation of *Roberts'* unavailability discussion. Rather, I believe that *Inadi* merely reaffirms and applies the *Roberts* principle that a showing of unavailability is not required in all situations. See *Lee v. Illinois*, 476 U.S. 530, 549 n.2 (1986) (Blackmun, J., dissenting). Thus, to me, *Inadi* represents a directive to lower courts to carefully analyze the facts of a given situation before concluding that a showing of unavailability is constitutionally required. Moreover, I believe that *Inadi* provides us with the factors to be used in making this determination—significance of the context in which the statements were made, potential change in the status of the declarant, burden to the prosecution of demonstrating unavailability and benefit to the defendant of having the declarant testify.

The delineation of these factors does not of course end the inquiry, for the question of application remains. In my view, there are two possible approaches to this problem although both lead to the same result in the present case. The first approach, which may be termed the case-by-case approach, involves analyzing the facts of a particular case in terms of the criteria delineated in *Inadi*. Under this approach, I believe that the state was constitutionally required to demonstrate T's unavailability. Unlike *Inadi*, T's statements were not made during the course of the critical event but rather represented her recollection of past events. Thus, it cannot be said that the statements derived much of their significance from the context in which they were made. Second, T's status did not change appreciably in the interval between the making of the statements and the trial—T was a little girl who was not facing the threat of prosecution and had no motive to testify falsely at trial. Third, the burden to the prosecution of producing T or demonstrating her unavailability

was not substantial. T was readily identified and located and could have easily been transported to trial. Conversely, the benefit to the defendant of having T testify at trial was substantial. T's statements went to the essential issue in the case—the identity of the abuser. Moreover, T was the only individual who had the opportunity to observe the abuser and, in fact, gave conflicting accounts of his identity. Under these circumstances, T's testimony at trial could have been critical to the defendant for if T repudiated her identification of the defendant on the stand, in all probability a judgment of acquittal would have been entered.

The case-by-case approach is appealing in the abstract, for in theory, it should accurately identify the cases where a showing of unavailability would be pointless. On further reflection, however, significant problems with this approach emerge. In particular, I believe that a case-by-case approach will engender a great deal of uncertainty in a critical area of the law. Thus, neither party will know prior to trial whether a showing of unavailability will be required. Consequently, the prosecution may in fact expend a great deal of effort in order to produce a declarant only to discover that the presence of the declarant at trial was not required. Moreover, it will often not be possible for the trial judge to accurately evaluate the *Inadi* factors at the time the prosecution offers the statements. In particular, the benefit to the defendant of the declarant's testimony may not become apparent until other witnesses testify.

A second possible approach would link the unavailability requirement to the particular hearsay exception. Under this approach, a determination that a statement fits within the medical diagnosis exception will necessarily dictate a particular result on the unavailability issue. By its terms, this approach demands assumptions about the nature of evidence admitted under the particular exception in criminal cases and the identity of the typical declarant. These assumptions in turn are to be evaluated in light of the criteria delineated in *Inadi*. As with all generalizations, there is always the possibility of an erroneous result in

a particular case. In my view, however, the danger of erroneous results when this exception is involved is slight and is substantially outweighed by the certainty that this approach would provide. The need for certainty, a primary goal of Confrontation Clause jurisprudence, *see Ohio v. Roberts*, 448 U.S. 56, 66 (1980), is particularly acute in the case of this particular exception for the medical diagnosis exception is being used with increasing frequency in prosecutions for child abuse. *See United States v. Shaw*, 824 F.2d 601 (8th Cir. 1987); *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985); *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980); *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979).

As noted above, the Supreme Court in *Inadi* identified several factors in determining that the prosecution need not demonstrate the declarant's unavailability when statements fall under 801(d)(2)(E)—significance of the context in which the statements were made, potential change in the status of the declarant, burden to the prosecution of producing the declarant, and minimal benefit to the defendant of having the declarant testify. In my view, these factors are inapposite to the typical case involving Rule 803(4) or its state counterpart. Consequently, I would hold that when statements are admitted pursuant to the medical diagnosis exception to the hearsay rule, a showing of unavailability is always required.

First, I do not believe that statements ordinarily admitted under the medical diagnosis exception derive much significance from the context in which they are made. Unlike the co-conspirator context, the declarant under the medical diagnosis exception is not engaged in an illicit enterprise at the time the statements were made; in fact as in this case, the statements are generally not made when the relevant act is taking place but rather represent the declarant's recollection of past events. In this respect, the statements are akin to trial testimony. Thus, I believe that "when the declarant takes the stand, his in-court testimony [generally] will reproduce a significant

portion of the evidentiary value of the statements." *Inadi*, 475 U.S. at 395.

Second, unlike *Inadi*, the status of the typical declarant under this particular exception will not have changed materially between the time the statements were made and the time of trial. The declarant under this exception will generally be a victim not a criminal facing the threat of imminent prosecution, and will usually have no motive to testify falsely about his or her prior statements.

Finally, in my view, the outcome of *Inadi's* balancing test is reversed when the medical diagnosis exception is involved. In *Inadi*, the Court emphasized the burden to the entire criminal justice system of adding another tier of appellate review in complex cases and the burden to the prosecution of identifying, locating and transporting the declarant to trial. These conclusions are premised on the special nature of conspiracies which often involve several individuals scattered throughout a wide area. These factors, however, are not present under the medical diagnosis exception. In a typical case under this exception there is a single declarant,—the victim, who is easily identified and located.

On the other hand, the value of the testimony by a declarant under this exception is generally substantial. As noted above, the typical declarant under this exception is the victim, and generally is the only individual with first-hand knowledge of the crime. Moreover, the statements themselves generally involve central issues in the case such as identity, *United States v. Renville*, 779 F.2d 430, 437 (8th Cir. 1985), cause, *United States v. Nick*, 604 F.2d 1199, 1201-02 (9th Cir. 1979) or fact of injury. Given these facts, in most cases the appearance of the typical declarant under the medical diagnosis exception is of great value to the defendant for by discrediting the declarant's testimony, the defendant necessarily casts doubt upon the principal evidence in favor of the prosecution.

Thus, under either a case by case or exception by exception approach, I believe that the Confrontation Clause

required the prosecution to demonstrate T's unavailability as a condition to the admission of the statements through Dr. McLean. Having said this, I nevertheless conclude that the prosecution has succeeded in demonstrating that T was unavailable. I do not reach this conclusion due to T's age. While the fact that T was three years old at the time of trial is certainly a relevant factor in determining unavailability, it is not in my view dispositive since extremely bright, verbal three year olds can provide meaningful testimony at trial. *See e.g., United States v. Frazier*, 678 F. Supp. 499 (E.D. Pa. 1986). Rather, I believe that the prosecution clearly established that T could not provide meaningful testimony about the alleged assault. The testimony of Dr. McLean, the only professional who had significant contact with T, indicated that the victim, even on the eve of trial strongly resisted making any statements about her father. Moreover, the defendant introduced no evidence that even obliquely questioned the validity of this assertion. Given these facts, I believe that the prosecution established that T was not available to testify at trial.

II.

In addition to establishing T's unavailability the prosecution also had to demonstrate that the statements had sufficient indicia of reliability. In *Roberts*, the Court held that the reliability requirement could be satisfied in two ways. First, "reliability could be inferred without more when the evidence fell within a firmly rooted hearsay exception." 448 U.S. at 66. Second, even if the evidence did not come within a firmly-rooted exception, reliability could be shown if the evidence had particularized guarantees of trustworthiness." *Id.*

In *Bourjaily v. United States*, 107 S.Ct. 2775 (1987), the Supreme Court elucidated the meaning of the term "firmly-rooted." There, the Court held that a firmly-rooted hearsay exception is one that has "a long tradition of being outside the compass of the general hearsay exclusion."

Id. at 2783. Thus, the test of "firmly-rooted" is simply the longevity of the exception's existence. The Court noted, however, that when the evidentiary rule deviates from the common law approach an independent reliability inquiry is required. *Id.*

The Wisconsin Supreme Court held that T's statements identifying the defendant as the abuser fit within the medical diagnosis or treatment exception to the hearsay rule and the validity of this interpretation is not an issue in this habeas corpus case. At common law, the admission into evidence of statements made to others for purposes of treatment was a well-established practice. *See United States v. Nickle*, 60 F.2d 372, 373-74 (8th Cir. 1932). The common law version of this exception, however, did not embrace statements of fault; the admission of these types of statements under this particular exception is the product of the Federal Rules of Evidence (enacted in 1974) and recent court decisions. *See People v. LaLone*, No. 79221 (Mich. Sup. Ct. March 30, 1989) (Lexis, States Library, Mich. File). Since this development represents a marked deviation from and expansion of the common law approach, *Bourjaily* dictates that an individualized examination into the reliability of T's statements is required.

As noted above, under the second *Roberts* test statements are admissible if they have particularized guarantees of trustworthiness. In my view these guarantees are present in this case. First, as the majority notes, the graphic description of the nature of the abuse in childlike language clearly established that sexual abuse had taken place. Second, T told several other individuals who testified at trial that the defendant had abused her. Finally, shortly after the alleged acts had taken place, T began manifesting an abnormal and uncharacteristic terror at the prospect of seeing her father. Given these facts, I believe that T's statements to Dr. McLean identifying the defendant as the abuser had particularized guarantees of trustworthiness within the meaning of *Roberts*.

In sum, I believe that the prosecution was required to show that T was not available to testify at trial and that the statements she made to Dr. McLean had particularized guarantees of trustworthiness. In my view, the prosecution satisfied both of these requirements. Consequently, I agree with the majority that the admission of T's statements to Dr. McLean at trial did not violate the defendant's sixth amendment rights.

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